152 US 101

RECORD, CASE No. 14,157.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 188.

THE NORTHERN PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JANE EVERETT, ADMINISTRATRIX OF WILLIAM J. EVERETT, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

FILED SEPTEMBER 18, 1890.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 14, 1893.

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1 WILLIAM J. EVERETT
vs.
THE NORTHERN PACIFIC RAILROAD CO.

Pleas before the Honorable Henry C. Caldwell, judge of the circuit court of the United States for the eighth circuit and district of North Dakota, and the Honorable Alfred D. Thomas, judge of the district court of the United States for the district of North Dakota, sitting in said court at the term of April, A. D. 1890.

Be it remembered that on the 26th day of February, 1890, the clerk of the district court in and for the county of Stutsman and State of North Dakota filed the following papers in said circuit court upon a petition for removal of said cause from the said district court of the State of North Dakota to the circuit court of the United States for the district of North Dakota; which said papers are in words and figures following, to wit:

Summons.

TERRITORY OF DAKOTA, }
County of Stutsman. }

In District Court, Sixth Judicial District.

WILLIAM J. EVERETT, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Summons.

The Territory of Dakota sends greeting to The Northern Pacific Railroad Company, defendant:

You are hereby summoned and required to answer the complaint of the above-named plaintiff, a copy of which is herewith served upon you, and to serve a copy of your answer to said complaint upon the subscriber, at his office, in the city of Jamestown, Dakota, within thirty days after the service of this summons upon you, exclusive of the day of such service, and you are hereby notified that if you fail to answer said complaint within that time the plaintiff will take judgment against you for the sum of thirty thousand dollars, together with the costs and disbursements of this action

Dated Jamestown, D. T., 28th August, A. D. 1889.

S. L. GLASPELL AND GEO. H. PURCHASE,
Att'ys for Plaintiff.

2 Upon the back of said summons appear endorsements in words and figures following, to wit:

Filed in the office of clerk dist. court for Stutsman county, N. Dakota, Nov. 13, 1889, at 11 o'clock a. m. T. F. Branch, clerk.

Complaint.

TERRITORY OF DAKOTA, }
County of Stutsman. }

In District Court, Sixth Judicial District.

WILLIAM J. EVERETT, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Complaint.

The plaintiff complains and alleges:

I.

That the defendant is a corporation organized and existing under the laws of the United States.

II.

That defendant owned and operated at all times mentioned in this complaint a line of railroad in and through the city of Jamestown, county of Stutsman, and Territory of Dakota, and owned, used, and controlled the certain cars hereinafter mentioned.

III.

That on the 6th day of July, A. D. 1889, the plaintiff was engaged in the service of the defendant as a yard switchman in the yards of the defendant at Jamestown, as aforesaid, and it was part of his duty to couple cars.

That on said day the plaintiff was ordered by the yard foreman of the defendant to couple a certain car owned by the defendant on said railroad in said yards at Jamestown; that said car was by the defendant negligently and carelessly loaded with bridge timbers at West Superior, Wisconsin, so that the said timbers projected over each end of said car to such an extent as to leave insufficient space for coupling with safety; that said car was loaded in an unusual and dangerous manner, and contrary to the rules and custom of the defendant, in that said timbers projected over the ends of said car for a distance of twenty-two inches; that said car so loaded had been inspected by defendant by its proper officers and negli-
3 gently and carelessly accepted and moved from West Superior, Wisconsin, to Jamestown.

IV.

That the plaintiff was required by the defendant to couple said car to another in the Jamestown yard as aforesaid, and plaintiff says that he was at said time of the age of twenty-four years and inexperienced in railroad work; that he had been engaged in the work

of switching one week prior to said day and no more, and that the defendant and its officers had knowledge of his youth and inexperience, but had not informed him or given him any notice of the dangers of switching, or advised or informed him of any rules or regulations or customs relating thereto; and, being ignorant of the manner in which said car was loaded and having no notice or knowledge of the fact that the timbers on said car projected over the ends thereof, the plaintiff attempted, in obedienc- to said order, to make said coupling; that said car, loaded with lumber as aforesaid, was moved by a switch-engine, owned by defendant and controlled by employees of defendant, upon a side track where another car was standing, to be coupled thereto by the orders of the yard foreman; that, there being insufficient space between said cars, the plaintiff was caught by the head between the end of a piece of timber twelve inches square, which projected over the end of said car a distance of twenty-two inches, and the end of the other car, a box car, and his head was crushed, bruised, and maimed, so as to cause him great pain and injury; that by the said injury his head and face were deformed, disfigured, and permanently injured; several of his teeth were knocked out, his eyesight, hearing, and his mental faculties were seriously and permanently injured, his body, arms, and legs were hurt and made sore and lame; that the said injury caused him severe pain and suffering, and he still suffers therefrom, and will continue to suffer therefrom as long as he lives; that the plaintiff at the time of said injury was sound, mentally and physically, and was earning and receiving for his labor as a switchman two dollars and twenty-five cents per day; that by said injury he has been permanently injured, so that he will not be able to resume his employment or perform labor of any kind; that as the result of said injury he is now and will always remain a helpless invalid, unable to work or care for himself; that by said negligent and careless conduct of defendant in loading and receiving said car in said dangerous condition, and by requiring plaintiff to make said coupling without giving him notice or warning of the same, defendant has greatly damaged plaintiff, to wit, in the sum of thirty thousand dollars.

4 Wherefore plaintiff asks judgment against the defendant for the sum of thirty thousand dollars and costs.

S. L. GLASPELL,
GEO. H. PURCHASE,
Att'ys for Plaintiff.

TERRITORY OF DAKOTA, }
County of Stutsman, } *ss:*

William J. Everett, being first duly sworn, deposes and says that he is the plaintiff in the foregoing-entitled action; that he has read the complaint therein and knows the contents thereof; that the statements therein are true of his own knowledge except such matters as are therein stated upon information and belief, and as to such matters he believes it to be true.

WM. J. EVERETT.

Subscribed and sworn to before me this 29th day of August, A. D. 1889.

[SEAL.] F. D. ALEXANDER,
Notary Public, Stutsman Co., D. T.

Notice of Attorney's Lien.

TERRITORY OF DAKOTA, }
County of Stutsman. }

In District Court, Sixth Judicial District.

WILLIAM J. EVERETT, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Notice of attorney's lien.

To the Northern Pacific Railroad Company:

Take notice that we claim an attorney's lien in the sum of two thousand dollars ($2,000) upon all monies in your hands, possession, or under your control due the plaintiff in this action, for retainer and legal services rendered and to be rendered for the plaintiff in the above-entitled action.

Dated September 18th, A. D. 1889.

S. L. GLASPELL,
GEO. H. PURCHASE,
Att'ys for Plaintiff.

TERRITORY OF DAKOTA, }
County of Stutsman, } *ss:*

F. D. Alexander, being first duly sworn, deposes and says that he is and at the times hereinafter mentioned was a citizen of the United States over 21 years of age and not a party to the above-entitled action; that at the city of Jamestown, county of Stutsman, and Territory of Dakota, on the 18th day of September, A. D. 1889, he served the within-summons and complaint and notice of attorney's lien upon the within-named defendant, The Northern Pacific Railroad Company, by delivering to and leaving with E. J. Schwellenbach true and correct copies of said summons, complaint, and notice of attorney's lien, he being then and there the duly appointed and acting ticket agent of the defendant at its station in the city of Jamestown, county of Stutsman, and Territory of Dakota.

F. D. ALEXANDER.

Subscribed and sworn to before me this 18th day of September, A. D. 1889.

[SEAL.] JESSE A. FRYE,
Notary Public, Stutsman Co., D. T.

Upon the back of said summons, complaint, and notice of attorney's lien appear endorsements in words and figures following, to wit:

1450. Original. District court, county of Stutsman. Wm. J. Everett, plaintif-, *vs.* The N. P. R. R. Co., defendant. Summons and complaint. Filed in the office of clerk dist. court for Stutsman county, N. Dakota, Nov. 13, 1889, at 11 o'clock a. m. T. F. Branch, clerk. S. L. Glaspell and Geo. H. Purchase, att'ys for plaintiff.

Answer.

TERRITORY OF DAKOTA, }
Stutsman County. }

In District Court, Sixth Judicial District.

WILLIAM J. EVERETT
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant. }

The defendant, in answer to plaintiff's complaint herein, alleges:

I.

It admits the allegations in paragraphs I and II substantially as alleged.

II.

Further answering, said defendant denies each and every allegation in said complaint contained, save as hereinbefore expressly admitted, and specifically denies that by reason of any of the matters or things in said complaint alleged said plaintiff has been damaged in the sum of thirty thousand dollars or in any sum. For a further defense said defendant alleges that the injuries, if any, received by the plaintiff were the result of his own negligence and carelessness, and were not caused by the negligence and carelessness of the defendant or any of its agents or servants.

Wherefore defendant demands that this action be dismissed and for its costs.

JNO. S. WATSON,
Def't's Att'y.

6 TERRITORY OF DAKOTA, }
Stutsman County. }

John S. Watson, being duly sworn, on oath says he is attorney for the defendant in the action entitled in the foregoing answer; that said answer is true to the best of his knowledge, information, and belief; that this affidavit of verification is made by the affiant for the reason that none of the officers of defendant are present in the county of Stutsman, wherein this affiant resides.

JOHN S. WATSON.

Subscribed and sworn to before me this 16th day of October, A. D. 1889.

F. D. ALEXANDER,
[SEAL.] *Notary Public.*

Service of the foregoing answer by copy is admitted this Oct. 16th, 1889.

S. L. GLASPELL,
Pl'ff's Att'y.

Upon the back of said answer appear endorsements in words and figures following, to wit:

Filed in the office of clerk dist. court for Stutsman county, N. Dakota, Dec. 2, 1889, at 10 o'clock a. m. T. F. Branch, clerk.

TERRITORY OF DAKOTA, }
County of Stutsman. }

In District Court, Sixth Judicial District.

WILLIAM J. EVERETT, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Affidavit on Motion for Commission to Examine Witness out of the Territory.

TERRITORY OF DAKOTA, }
County of Stutsman, } *ss:*

S. L. Glaspell, being first duly sworn, deposes and says that he is attorney for the plaintiff in the above-entitled action; that the summons in said action has been served, and that Theodore M. Kieren is a witness material and necessary for the said plaintiff on the trial of the said action, without the benefit of whose testimony the said plaintiff cannot safely proceed to the trial of said action; that said witness resides in the town of Wallula, in the Territory of Washington, and is out of this Territory and will continue absent when his testimony is required.

S. L. GLASPELL.

Subscribed and sworn to before me this 30th day of October, A. D. 1889.

JESSE A. FRYE,
[SEAL.] *Notary Public, Stutsman Co., D. T.*

7 Upon the back of said affidavit on motion appear endorsements in words and figures following, to wit:

Filed in the office of clerk dist. court for Stutsman county, N. Dakota, Nov. 13, 1889, at 11 o'clock a. m. T. F. Branch, clerk.

Notice of Motion for Commission to Examine Witness out of the Territory.

TERRITORY OF DAKOTA, }
County of Stutsman. }

In District Court, Sixth Judicial District.

WILLIAM J. EVERETT, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Notice of motion for commission to examine witness out of the Territory.

The defendant and its attorney will please take notice that upon the within affidavit and upon the complaint and all the pleadings in the above-entitled action I will move the court, at his chambers, in the city of Jamestown, Dakota, on the 8th day, of November, A. D. 1889, at the hour of 10 o'clock a. m. of that day, or as soon thereafter as counsel can be heard, that a commission issue out of said court to take the testimony of Theodore M. Kiernan, a witness on behalf of the plaintiff, residing out of the Territory, directed to some proper person residing in the town of Wallula, in the Territory of Washington, then and there to be selected and appointed by the judge of this court.

Dated October 30th, A. D. 1889.

S. L. GLASPELL,
Att'y for Plaintiff.

To The Northern Pacific Railroad, defendant, and John S. Watson, att'y for defen't.

Upon the back of said notice of motion appear endorsements in words and figures following, to wit:

Filed in the office of clerk dist. court for Stutsman county, N. Dakota, Nov. 13, 1889, at 11 o'clock a. m. T. F. Branch, clerk.

8 Upon the cover of said affidavit and notice of motion appear endorsements in words and figures following, to wit:

1450. District court, Stutsman county. Wm. J. Everett *vs.* N. P. R. R. Co. Notice. Service of the within notice and affidavit admitted this 30th day of October, 1889. Jno. S. Watson, att'y for defendant. S. L. Glaspell, att'y for plaintiff.

Order for Commission to Take Deposition.

TERRITORY OF DAKOTA, }
County of Stutsman. }

In District Court, Sixth Judicial District.

WILLIAM J. EVERETT, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Order for commission to take deposition.

Upon reading and filing the affidavit of S. L. Glaspell, and upon the files, records, and papers in this action, and due proof of service of notice of motion having been made, upon the motion of S. L. Glaspell, attorney for plaintiff in said action,—

It is ordered that a commission issue out of and under the seal of this court, through the clerk of said court, directed to J. T. Meade, a notary public residing in the town of Wallula, in the State of Washington, to take the testimony of Theodore M. Kieren, residing at the same place, as a witness on behalf of the plaintiff herein, upon such proper interrogatories, direct and cross, as the respective parties may prepare.

Dated this 8th day of November, A. D. 1889.

RODERICK ROSE, *Judge.*

Upon the back of said order appear endorsements in words and figures following, to wit:

Filed in the office of clerk dist. court for Stutsman county, N. Dakota, Nov. 13, 1889, at 11 o'clock a. m.

9 *Notice of Trial.*

STATE OF NORTH DAKOTA, }
County of Stutsman, } *ss:*

District Court, Fifth Judicial District.

WILLIAM J. EVERETT, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD CO., Defendant.

Sir: You will please take notice that the issue of law and fact in the above-entitled action will be brought on for trial at the next regular term of the district court to be held in and for the county of Stutsman, at the court-house, in the city of Jamestown, in said county, on the third day of December, A. D. 1889, at the opening of said court on that day, or as soon thereafter as counsel can be heard.

Dated Nov. 12, 1889.

Yours respectfully,

S. L. GLASPELL,
Attorney for Pl'tff.

To John S. Watson, Esq., attorney for def't.

Upon the back of said notice of trial appear endorsements in words and figures following, to wit:

1450. District court, fifth judicial district, county of Stutsman. Wm. J. Everett *vs.* N. P. R. R. Co. Notice of trial. Due service of the within notice is hereby admitted this 12th day of Nov., 1889, at Jamestown, N. D. John S. Watson, attorney for def't. Filed in the office of clerk dist. court for Stutsman county, N. Dakota, Nov. 13, 1889, at 11 o'clock a. m. T. F. Branch, clerk.

Note of Issue.

District Court, County of Stutsman, 5th Judicial District.

WILLIAM J. EVERETT, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD CO., Defendant.

Note of issue: Issue of law and fact. Last pleading served Oct. 17, 1889.

S. L. GLASPELL,
Att'y for Plaintiff.
JNO. S. WATSON,
Att'y for Defendant.

Will the clerk please file this note of issue and enter upon the calendar for the Dec, A. D. 1889, term of this court.

Yours, &c, S. L. GLASPELL,
Attorney for Plaintiff.

Upon the back of said note of issue appear endorsements in words and figures following, to wit:

Filed in the office of clerk dist. court for Stutsman county, N. Dakota, Nov. 22, 1889, at 2 o'clock p. m. T. F. Branch, clerk.

10 *Commission to Take Testimony.*

STATE OF NORTH DAKOTA,
County of Stutsman.

In District Court, Fifth Judicial District.

WILLIAM J. EVERETT, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Commission to take testimony.

The People of the State of North Dakota to J. T. Meade, Greeting:

Whereas it appears to our judge of our district court in and for the county of Stutsman and State of North Dakota that Theodore M. Kieren, of the town of Wallula, in the State of Washington, is a material witness in a certain action now pending in our said dis-

trict court between William J. Everett, as plaintiff, and The Northern Pacific Railroad Company, as defendant, and that the personal attendance of said witness cannot be procured at the trial of said action, we, in confidence of your prudence and fidelity, have appointed you, and by these presents do appoint you, a commissioner to examine said witness, and therefore we authorize and empower you, at certain days and places to be by you for that purpose appointed, diligently to examine said witness on the interrogatories annexed to this commission, together with the cross-interrogatories, and upon oath, first taken before you, and cause the said examination of the said witness to be reduced to writing and signed by him and yourself, and then return the same, annexed to this commission, to the clerk of this court with all convenient speed, inclosed under your seal.

Witness Hon. Roderick Rose, judge of the district court in and for Stutsman county, N. D., this 8th day of Nov., A. D. 1889.

Attest my hand and the seal of said court the day and year last above written.

T. F. BRANCH, *Clerk.* [SEAL.]

Upon the back of said commission to take deposition appear endorsements in words and figures following, to wit:

Filed in the office of clerk dist. court for Stutsman county, N. Dakota, this Dec. 9, 1889, at 10 o'clock a. m. T. F. Branch, clerk.

11 *Direct Interrogatories on the Part of the Plaintiff.*

Int. 1. State your name, age, residence, and occupation.

Int. 2. Have you lived in Jamestown, Stutsman Co., North Dakota, and, if so, what was your occupation during that time?

Int. 3. Do you know William J. Everett, the plaintiff in this suit? If yes, how long have you known him, and what was his occupation while you knew him?

Int. 4. State what you know of his receiving and injury while coupling cars in the yards of the Northern Pacific Railroad Company at Jamestown, North Dakota. State all the particulars of the matter.

Int. 5. How long had Everett been engaged in the work of switching when the accident happened?

Int. 6. If you have testified that Everett was caught between a flat car loaded with lumber and a box car, state how the flat car was loaded.

Int. 7. If you have stated that the lumber on said car projected over the ends thereof, state how far it projected over each end.

Int. 8. How far, if any distance, did it project over the end where the accident happened?

Int. 9. How did you ascertain these distances?

Int. 10. You may state whether or not Everett saw or had any opportunity to see the flat car loaded with lumber before attempting the coupling. If you say he did not, state how you know that fact.

Int. 11. State whether the flat car was loaded in the usual or in an unus-al way.

Int. 12. If you have stated that it was loaded in an u-sual manner, state in what particulars.

Int. 13. State how long you have been engaged in the business of yard switching.

Int. 14. Did you see Everett at the time of the accident described or immediately thereafter? If yes, describe his condition at that time.

12 *Cross-interrogatories to be Propounded to J. T. Keiran.*

No. 1. State what time of day it was when the accident occurred.

No. 2. Did you personally witness the accident to plaintiff, and what distance was there between you and him when the same occurred?

No. 3. State if there was sufficient day-light at that time to enable plaintiff to see whatever took place in front of him.

No. 4. State what plaintiff was doing just before the accident occurred.

No. 5. State what plaintiff was doing at the time of the accident.

No. 6 State if it is not a fact that the plaintiff received his injury after he made or attempted to make the coupling between said cars.

No. 7. State how long the cars causing the accident had been in the yards prior to the accident.

No. 8. State if plaintiff prior to the accident had been working around said yard.

No. 9. If you have answered the previous cross-interrogatories in the affimative, state if plaintiff had an opportunity to see the cars causing the accident.

No. 10. State whether the plaintiff, when he attempted to make the coupling, could have seen by looking at said cars that the timbers with which the flat car was loaded projected over the end thereof.

No. 11. Did plaintiff at the time of the accident know that the timbers upon the flat car projected over the end thereof?

No. 12. Did plaintiff prior to the accident make any examination of said cars?

Upon the back of said commission and interrogatories appear endorsements in words and figures following, to wit:

1450. District court, county of Stutsman. Wm. J. Everett *vs.* The N. P. R. R. Co. Commission to take deposition. S. L. Glaspell, att'y for plaintiff, Jamestown, N. D. Filed in the office of clerk dist. court for Stutsman county, N. Dakota, Dec. 9, 1889, at 10 o'clock a. m. T. F. Branch, clerk.

13 *Answers to Direct Interrogatories on Part of the Plaintiff.*

T. M. KIERIN sworn:

Ans. to Int. 1. Theodore M. Kierin; twenty-eight; Wallula, Walla Walla, Wash.; brakeman.

Ans. to Int. 2. Yes, sir; both brakeman and switchman.

Ans. to Int. 3. Yes; about six months; at first I knew him as call boy, and then he started in as switchman with me about 28th June, 1889.

Ans. to Int. 4. On July 6th, 1889, we started to work about 6 o'clock p. m., switching the house cars, and after we got through switching the house cars we commenced switching No. 21—that is, the east-end local between Jamestown and Fargo. We went down and coupled on our engine and stood there waiting for our orders from the foreman; he gave us a signal to back up, and we answered it, and the engineer backed up. When the hind end of the cars came along, the foreman called 5, 7, 6, and 4, to the best of my knowledge. I followed the engine and Will Everett worked in the field—that is, catching cars and coupling them. He threw the switch for No. 7, and the cars were right on top of him; he ran ahead of the cars to set the pin to make the coupling, and before he could have time to see the timbers sticking over it caught his head; then we kicked two cars on No. 6 switch. I run after and caught them, for they were coming back again. I set a brake on them, and I called over to the foreman that Will was hurt, and I went forward and helped to pick him up. We carried him alongside of the cars. Repairer Schack and I went up and notified the yard master of the accident to Will. It was a flat car loaded with timber that he went to couple to a box car. The timber stuck over 22 inches.

Ans. to Int. 5. About nine days.

Ans. to Int. 6. The flat car was loaded in an unusual manner, with the timbers loaded over the end so as to project 22 inches.

Ans. to Int. 7. The lumber projected 22 inches over the end Will was caught; did not project over the other end.

Ans. to Int. 8. 22 inches.

Ans. to Int. 9. I measured them before the car was moved.

Ans. to Int. 10. Everett did not have a chance to see the flat car, for he was running ahead to throw the switch and the car was right on him. I was watching them.

Ans. to Int. 11. In an unusual way.

Ans. to Int. 12. The lumber projected 22 inches over one end.

Ans. to Int. 13. About three years.

14 Ans. to Int. 14. No, not at that time, but immediately thereafter. He was laying alongside of the rail, with his face to the ground; he was bleeding out of his nose, mouth, and ears, and in an insensible condition.

THEODORE M. KIEREN.

Answers to Cross-interrogatories Propounded to J. F. Kieren.

Ans. to # 1. Between six and seven p. m.
Ans. to # 2. No; one hundred and forty feet.
Ans. to # 3. Yes.
Ans. to # 4. He was running to set his pin to make coupling.
Ans. to # 5. Making the coupling.

Ans. to # 6. He received his injuries in attempting to make the coupling.

Ans. to # 7. About half hour for the flat car; I don't remember about the box car.

Ans. to # 8. Yes.

Ans. to # 9. No.

Ans. to # 10. I do not know.

Ans. to # 11. No.

Ans. to # 12. No.

THEODORE M. KIEREN.

STATE OF NORTH DAKOTA, }
County of Stutsman. }

In District Court, Fifth Judicial District.

WILLIAM J. EVERETT, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD CO., Defendant.

STATE OF WASHINGTON, }
County of Walla Walla, } *ss:*

I, J. T. Meade, a notary public in and for the county of Walla Walla and State of Washington, do hereby certify that the witness, Theodroe M. Kieren, in the foregoing deposition named, was first duly sworn to testify the truth, the whole truth, and nothing but the truth in said cause, wherein William J. Everett — plaintiff and The Northern Pacific Railroad Company is defendant; that the said deposition was taken at the time and place mentioned in the foregoing commission, issued out of the district court in and for the county of Stutsman and State of North Dakota, to wit, at my office, in the town of Wallula, in said county of Walla Walla and State of Washington, on the 26th day of November, A. D. 1889; that said deposition was taken upon the interrogatories and cross-interrogatories hereto attached; that said deposition was reduced to writing by me, and when completed was by me carefully read to the witness, and was thereafter subscribed by him in my presence.

In witness wh-reof I have hereunto subscribed my name and affixed my seal of office this 5th day of December, A. D. 1889.

J. T. MEADE,

[SEAL.] *Notary Public, Walla Walla County, Washington.*

Upon the back of said deposition appear endorsements in words and figures following, to wit:

'1450. Filed in the office of clerk dist. court for Stutsman Co., N. Dakota, Dec. 9, 1889, at 10 o'clock a. m. T. F. Branch, clerk.

Petition and Bond on Removal to U. S. Circuit Court, Dist. North Dakota.

STATE OF NORTH DAKOTA, }
Stutsman County. }

In District Court, Fifth Judicial District.

WM. J. EVERETT, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD CO., Defendant. }

To the honorable the court aforesaid:

The petition of The Northern Pacific Railroad Company, the defendant in the above-entitled action, respectfully shows that said defendant is a corporation—not banking—duly organized, created, and existing under and by virtue of that certain act of Congress of the United States approved July 2nd, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route," and those certain subsequent acts and joint resolutions of Congress relating to the same subject-matter; that by virtue of said acts and joint resolutions of Congress said defendant has constructed and now owns, maintains, and operates a line of railroad and telegraph extending westwardly from Lake Superior to Puget sound; that the above-entitled action has been commenced and is now pending in this court; that the date of the commencement of said action was on or about Sept. 18th, 1889; that the same has not yet been tried; that the amount in controversy in said action exceeds the sum of two thousand dollars, exclusive of costs and interest; that the amount so involved is the sum of thirty thousand dollars, as will more fully appear by reference to the complaint therein; that by reason of the premises said action is
16 an action arising under the laws of the United States and, furthermore, your petitioner has a defense thereto arising under the laws of the United States; that said action arose and was commenced in the Territory of Dakota, and within the limits of that portion of said Territory which has since the commencement of said action been admitted into the Union, and become one of the States of the United States, as the State of North Dakota; that said action was pending in the district court for Stutsman county at the time of the admission of said State of North Dakota into the Union; that said action is a suit of which the circuit court of the United States for the district of North Dakota might have had jurisdiction under the laws of the United States had such circuit court of the United States for the district of North Dakota been in existence at the time of the commencement of said action, and that by reason of the premises the petitioner is entitled under the acts of Congress for such cases made and provided, and more particularly under the certain act of Congress approved Feb'y 22nd, 1889, entitled "An act

to provide for the division of Dakota into two States, and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments, and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States," to remove said action into the circuit court of the United States for the district of North Dakota for the proceedings therein, and to that end herewith tenders to this court proper and sufficient sureties for the doing by it of the several things required by the said acts to be done upon the removal of a cause into a United States court.

Wherefore your petitioner prays that the said surety may be accepted, and that this court proceed no further in said cause, and that the same be transmitted to the circuit court of the United States for the district of North Dakota for further proceedings therein.

Dated November 25th, 1889.

JOHN S. WATSON,
Attorney for Petitioner.

STATE OF NORTH DAKOTA, }
Stutsman County. }

In District Court, Fifth Judicial District.

WILLIAM J. EVERETT, Plaintiff, }
vs. }
NORTHERN PACIFIC RAILROAD COMPANY, Defendant. }

Bond on Removal to United States Court.

Know all men by these presents that we, E. P. Wells and C. P. Smith, sureties of the Northern Pacific Railroad Company, are held and firmly bound unto William J. Everett, the plaintiff in
17 the above-entitled suit, in the penal sum of five hundred dollars ($500.00), lawful money of the United States; for the payment of which, well and truly to be made, we hereby bind ourselves and our executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated on this November 25th, 1889.

Whereas the said Northern Pacific Railroad Company has filed its petition in the court aforesaid, praying for the removal into the circuit court of the United States for the district of North Dakota of the above-entitled suit under and by virtue of the acts of Congress for such cases made and provided: Now, therefore, if the said Northern Pacific Railroad Company shall enter in the circuit court of the United States for the district of North Dakota, on the first day of its session hereafter, copy of the record in said suit, and shall pay all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, in such case the above obligation to be void, but otherwise to remain of full force and effect.

E. P. WELLS.
C. P. SMITH.

Signed, sealed, and delivered in presence of—

—— ——.

STATE OF NORTH DAKOTA, }
County of Stutsman. }

Personally come before the undersigned E. P. Wells and C. P. Smith, the same persons who executed the foregoing instrument, and acknowledged that they executed the same freely and voluntarily; and each of said persons, being by me duly sworn, did depose and say that he is a resident and freeholder of this State, and worth the sum of one thousand dollars above his debts, liabilities, and property exempt from levy and sale under execution.

E. P. WELLS.
C. P. SMITH.

Subscribed and sworn to before me this 27th day of Nov., 1889.

[SEAL.] GEORGE WYLIE,
Notary Public.

The foregoing bond is hereby accepted and approved.

RODERICK ROSE, *Judge.*

Upon the cover of said petition and bond for removal appear endorsements in words and figures following, to wit:

1450. District court, Stutsman county. William J. Everett, plaintiff, *vs.* Northern Pacific Railroad Company, defendant. Petition and bond for removal to U. S. circuit court, dist. N. Dak. John S. Watson, attorney for petitioner, Jamestown, Dakota. Filed in the office of clerk dist. court for Stutsman county, N. Dakota, Nov. 29, 1889, at 2 o'clock p. m. T. F. Branch, clerk.

18 *Clerk's Certificate.*

I, T. F. Branch, clerk of the district court within and for the county of Stutsman, North Dakota (formerly Territory of Dakota), do hereby certify that the annexed and foregoing papers, to wit, the summons, verified complaint, affidavit of service of same, notice of attorney's lien, notice of trial, order for commission to take deposition, affidavit on motion for order to take deposition, notice of motion for commission to take deposition, note of issue, answer and verification, commission to take deposition, direct and cross-interrogatories, deposition of T. B. Keiren and certificate of notary thereto, and petition and bond of defendant for the transfer of this cause to the United States circuit court for the district of North Dakota, constitute and are all the files, records, and proceedings which have been filed in my office and in the office of the clerk of the district court for Stutsman county, Territory of Dakota, in the case of William J. Everett, plaintiff, *versus* The Northern Pacific Railroad Company, defendant, and the said files, records, and proceedings, being numbered pages 1 to 25, inclusive, are hereby transmitted to the United States circuit court for the district of North Dakota in accordance with the prayer of said petition.

In witness whereof I have hereunto set my hand and the seal of said court this February twenty-first, A. D. 1890.

T. F. BRANCH,
[SEAL.] *Clerk of the District Court,*
Stutsman County, North Dakota.

Upon the back of said record from the district court of Stutsman county appear endorsements in words and figures following, to wit: 1 A. Transcript. William J. Everettt, plaintiff, *vs.* Northern Pacific Railroad Co., def't. Filed Febr. 26th, 1890. Wm. Booth, Jr., clerk.

19 . Thereupon, afterwards, at the April term of said court, on the 7th day of April, 1890, the following proceedings were had in the said case, as appears of record on folio 4 of Journal "A" of said court:

WM. J. EVERETT, Plaintiff,
vs.
NORTHERN PACIFIC R'Y CO., Defendant.

On motion of S. L. Glaspell, attorney for plaintiff, to remand this cause for want of proper jurisdiction, the same is hereby denied and cause set for trial April 21st.

Thereupon, afterwards, at the April term of said court, on the 21st day of April, 1890, the following proceedings were had in said case, as appears of record on folio 13 of Journal "A" of said court:

WM. J. EVERETT, Plaintiff,
vs.
NORTHERN PACIFIC R'Y CO., Defendant. } Trial to Jury.

Now comes the parties herein, by their attorneys; also come the following-named persons as jurors, to wit:

1, H. H. Grover; 2, Fred. Falley; 3, A. F. Appleton; 4, O. A. Barnes; 5, W. J. Hawk; 6, L. N. Wood; 7, Ezra Turner; 8, W. S. Moorhouse; 9, Edward Fitzgerald; 10, Stewart Cairncross; 11, J. P. Dickey; 12, Nels Dyste, who are duly empanelled and sworn according to law; and thereupon, after hearing the evidence in part and the time having arrived for the adjournment of the court and the trial of this cause not being finished, the same was continued until ten o'clock to-morrow morning.

Thereupon, afterwards, at the April term of said court, on the 22nd day of April, 1890, the following proceedings were had in said case, as appears of record on folios 14 and 15 of Journal "A" of said court:

WM. J. EVERETT, Plaintiff,
vs.
N. P. R'Y CO., Defendant. } Cause Submitted.

This day again come the said parties, by their attorneys, and also come the jury heretofore empanelled and sworn, and the trial pro-

ceeded; and the said jury, having heard the remaining testimony, the argument, and charge of the court, retire to their room
20 *room* in charge of a bailiff for deliberation.

And now comes said jury into open court and presents to the court their verdict, which is in words and figures following, to wit:

In the United States Circuit Court, District of North Dakota.

WM. J. EVERETT, Plaintiff,
vs.
N. P. R'Y CO., Defendant. } Verdict.

We, the jury, find for the plaintiff and award him damages to the amount of seven thousand dollars ($7,000).

EZRA TURNER, *Foreman.*

Thereupon, afterwards, to wit, on the 22nd day of April, 1890, the following proceedings were had in said case, as appear of record on folio- 14 and 15 of Journal "A" of said court:

WM. J. EVERETT, Plaintiff,
vs.
N. P. R. R. Co., Defendant. } Judgment on Verdict.

The jury in this action having, on the 22nd day of April, 1890, rendered a verdict for the plaintiff and against the defendant and assesses the plaintiff's damages at the sum of seven thousand dollars, on motion of said plaintiff, by S. L. Glaspell, his attorney, it is ordered and adjudged by the court that the plaintiff is entitled to judgment on said verdict, and that said plaintiff have and recover of and from said defendant the sum of seven thousand dollars, together with costs, taxed at $75.00, and that execution issue therefor.

Thereupon, afterwards, to wit, on the 25th day of April, 1890, a motion for a new trial was filed in said case; which said motion is in words and figures following, to wit:

In the United States Circuit Court, State of North Dakota.

WILLIAM J. EVERETT, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Motion for New Trial.

Comes now the defendant, by its attorney, John S. Watson, and moves the court to vacate and set aside the verdict of the jury herein, and to grant to the defendant a new trial herein upon the following grounds, materially affecting the substantial rights of defendant:

21 1. The court erred in overruling and denying defendant's motion for an instruction to the jury to return a verdict in

favor of the defendant, which motion was made at the conclusion of plaintiff's testimony.

2. The court erred in overruling and denying defendant's motion for a instruction to the jury to return a cerdict in favor of the defendant, which motion was made after all the testimony had been submitted and before the jury retired to deliberate.

3. The court erred in declining and refusing to give the jury certain interrogatories submitted by defendant, and which interrogatories are set out at length in the bill of exceptions in this action.

4. The court erred in instructing the jury, in substance, that the plaintiff had a right to expect that the flat car was properly loaded, such instruction being set out fully and at length in the bill of exceptions to this action.

JOHN S. WATSON,
Def't's Attorney.

Upon the back of said motion for a new trial appear endorsements in words and figures following, to wit:

In U. S. circuit court, dist. North Dakota. William J. Everett, pl'ff, *vs.* The Northern Pacific Railroad Co., def't. Motion for new trial. Filed April 25, 1890. Wm. Booth, Jr., clerk.

Thereupon, afterwards, at the April term of said court, on the 26th day of April, 1890, the following proceedings were had in said case, as appears of record on folio 32, Journal "A" of said court:

WILLIAM J. EVERETT, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD CO.

Now, on this day, comes the defendant and files the bill of exceptions in this cause, duly signed and sealed by the circuit judge; which bill of exceptions is by order of the court filed and made a part of the record in this case.

Thereupon, afterwards, on the 26th day of April, 1890, a bill of exceptions was filed in said case; which said bill of exceptions is in words and figures following, to wit:

22 In the Circuit Court of the United States for the District of North Dakota.

WILLIAM J. EVERETT, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD CO., Defendant.

Be it remembered that on the trial of this cause the plaintiff introduced the following testimony, to wit:

MONDAY, *April 21st*, 1890—2.30 o'clock p. m.

WILLIAM J. EVERETT, the plaintiff, appearing as a witness in his own behalf, being first duly sworn, testifies as follows:

Direct examination by Mr. GLASPELL:

Q. What is your name?
A. William Everett.
Q. Are you the plaintiff in this case; did you bring this suit?
A. Yes, sir.
Q. Where do you live?
A. Jamestown.
Q. How long have you lived there?
A. About eight years.
Q. Have you lived in Jamestown eight years?
A. Just about.
Q. In the city all the time?
A. In the city all the time.
Q. What was your business on the 6th day of July last, when you were hurt?
A. Switching.
Q. Where and for whom?
A. In the night yard, at Jamestown.
Q. For whom?
A. For Yard-master Webber.
Q. For what railroad company?
A. For the N. P.
Q. The Northern Pacific?
A. Yes, sir.
Q. How long had you been in that business before July 6th?
A. About six or seven days.
Q. What had you been doing before that time?
A. Calling.
Q. What is calling?
A. Calling to brakemen and conductors.
Q. For whom?
A. For the trains that run.
23 Q. For the railroad company?
A. Yes, sir.
Q. For the Northern Pacific Railroad Company?
A. Yes, sir; for the Northern Pacific Railroad Company.
Q. What were your duties as caller?
A. Well, taking the messages to the round-house, besides calling the conductors and brakemen, besides taking the orders.
Q. From whom?
A. From George——
Q. From the train-dispatcher?
A. Yes, sir; from either George or Andrew.
Q. From the train-dispatcher to the round-house?
A. Yes, sir.

Q. Furthermore, it was your duty to call the train crews to go out on the road?

A. Yes, sir; to go out and make their trip.

Q. Did you have anything to do with switching or making couplings in that business?

A. I didn't.

Q. Were you at work in the yard of the company in that business—calling?

A. No, sir.

Q. Did you have any experience in switching or coupling cars before you went to work as a night yard switchman?

A. Well, I had one.

Q. Well, what was that?

A. That was the night I got my leg caught on the Valley train.

Q. Tell us all about it.

A. I went to make that coupling and, of course, I didn't know whether the car was on one side or not, and I stood near the anchorhead, and at the same time the coupling came up against my leg.

Q. What was your business at that time?

A. Calling.

Q. How came you to make this coupling?

A. There wasn't any of the boys around, and I tried to get the train out myself.

Q. Were you hurt?

A. I didn't let on that I was hurt, but I got my leg pretty badly smashed.

Q. What did you do then?

A. I went to the doctors and got my leg fixed up.

24 Q. Who employed you?

A. Charley Webber.

Q. Who is he?

A. He runs on the Valley road now.

Q. What was his business at that time?

A. He was yard-master.

Q. Of the Northern Pacific Railroad Company?

A. Yes, sir.

Q. At Jamestown?

A. Yes, sir.

Q. Was it part of his business to employ the men who worked in the yard at that time?

A. It seemed so to me.

Q. He employed you?

A. Yes, sir.

Q. Did he know about your getting hurt at the time you were hurt in the Valley train, that you know of?

A. I think he does.

Q. Well, what do you know?

A. Well, I know that he went up to the house to see me.

Q. When?

A. The next morning.

Q. Was that before you went to work as a yard switchman?

A. Yes, sir.
Q. How long before?
A. I think about a month and a half before.
Q. And he is the man who afterwards employed you as yard switchman?
A. Yes, sir.
Q. Were you intimately acquainted with him at that time?
A. I was.
Q. How intimately acquainted were you?
A. Ever since we got up the ball game; that is the way I got acquainted with him first.
Q. What ball game?
A. The Jimtown base-ball game.
Q. You saw him frequently?
A. Yes, sir.
Q. Did he see you frequently about your work during the two years you were calling?
A. Yes, sir.
Q. Did he know you were engaged in that calling?
25 A. Yes, sir.
Q. How do you know that?
A. He would see me at the round-house.
Q. Did he see you there?
A. He would see me every night that I came up town.
Q. What, if anything, did Webber say to you about getting hurt in making this coupling?
A. He said I had no right there to make that coupling.

By the COURT:

Q. Which coupling are you talking about now?

Mr. GLASPELL:

A. Valley-train coupling.

By the COURT:

Q. Not the one you sued upon?

By Mr. GLASPELL:

A. No, sir.
Q. Did you afterwards apply to Webber for work?
A. Yes, sir; I did.
A. What did you say to him?
A. I told him I would like to get a job braking.
Q. What did he say to you?
A. He said he would give me a job braking himself.
Q. Well, when?
A. As quick as I was able to work or probably in a night or so.
Q. Were you seriously injured at that time?
A. I was able to work the next night.
Q. What did you do the next night?
A. Went to work calling again.

Q. Tell us how you came to go to work switching.

A. Well, I didn't like the job of calling, and I was going to quit, and therefore Mr. Clemens, he spoke to Charley himself, and asked for the job of switching.

Q. Who is Clemens?

A. The night yard-master.

Q. And Webber is the day yard-master?

A. Yes, sir.

Q. Go ahead.

A. And Charley said he would get another caller the next night, and he came the next night and I went to switching.

Q. What conversation did you and Webber have before you went to switching, about that work?

A. None at all.

Q. Did you apply for a job of switching?

A. I didn't.

Q. What was it you applied for?

A. A job of braking.

26 Q. At the time you were employed by Webber to do switching did you say anything to him about your ability to do switching—whether you were able to do that kind of work?

A. He asked me if I was able to do it and I said I thought I was able to do it or able to stand it for a half a month.

Q. What time was this that you were employed?

A. As a switchman?

Q. Yes, sir.

A. Well, I couldn't say.

Q. How long before you were hurt?

A. About seven or eight days.

Q. How old are now?

A. I am going on twenty-five.

Q. What?

A. Twenty-five.

Q. How old were you when you were hurt?

A. Twenty-four.

Q. When was your birthday; when were you born—what year?

A. 1865, I think it was.

Q. What day and month?

A. 22nd of March.

Q. 1865. Well, you would be past twenty-five. You are twenty-five years old, are you not?

A. Yes, sir; twenty-five last March.

Q. Where were you on the night of the 6th of July, 1889; where were you at 6 o'clock?

A. Over in the house track.

Q. What were you doing there—switching?

A. Yes; switching the house.

Q. Were you at work for the defendant?

A. Yes, sir.

Q. What do you mean by switching the house?

A. Well, there is cars that you switch in different tracks and you have to take them out or have them removed.

Q. What did you do after that?

A. The foreman went and got the list for twenty-one.

Q. What do you mean by twenty-one?

A. That is the way freight from the east.

Q. What was the list; what was that?

A. The switching list is what the cars contain—numbers of the cars and what is for this station and what is for that station.

Q. What did you do next?

A. Well, we went to switching the train.

27 Q. Where was that train?

A. It was on number 5.

Q. Well, we don't know anything about No. 5; what was No. 5?

A. That is the first track from the main line.

Q. Was this in the company's yard at Jamestown?

A. Yes, sir.

Q. In the freight yard?

A. Yes, sir.

Q. What was the first thing you did about that train?

A. Was to get hold of the caboose and the car that the foreman cut off.

Q. What next?

A. Well, I don't know anything about the next, only running down and making the coupling.

Q. Who told you to make that?

A. Well, he yells out the tracks——

Q. Who yells out?

A. The foreman.

Q. Who is the foreman?

A. Mr. Weitzel yells out No. 7.

Q. What do you mean by saying #7?

A. He wanted to kick the head car down on #7 to make that coupling.

Q. Was there any cars on 7 at that time?

A. There was one box car.

Q. What did you do?

A. I started to make the coupling down that way, and there was no pin in the head of that car; and I went to the west end of that car, and I went to pick up a pin, and when I got it the car was within four feet of me, and I had just time to get the pin and it caught me, and I made one spring to get out from between the cars.

Q. What happened then?

A. I couldn't tell you.

Q. That is all you know about it?

A. Yes, sir.

Q. Where did you find yourself next after that?

A. I found myself in the parlor.

Q. At home?

A. At home.

Q. In the bed?

A. Yes, sir.

28 Q. Who was with you at that time?

A. Jim O'Donald was the only man I knew that came in the house.

Q. You have been working, you say, seven or eight nights before this?

A. Yes, sir.

Q. And Jake or Mr. Weitzel was the foreman?

A. Yes, sir.

Q. When Webber employed you what, if anything, did he say about the work that you would have to do—to you?

A. I don't think he told me anything.

Q. Do you know whether he did or not?

A. He didn't tell me anything the first week I was working.

Q. Did he tell you anything while you were working?

A. I don't think he did.

Q. Did Webber or any officer of the company furnish you with rules of the company?

A. No, sir.

Q. Did you ever read them?

A. No, sir.

Q. Do you know what they contain about switching and coupling?

A. No, sir.

Q. Weitzel was your foreman?

A. He was.

Q. While you were working how many flat cars did you couple that were loaded with lumber?

A. Only that one.

Q. Prior to this time did you ever see cars with ends of lumber projecting over the car?

A. I didn't.

Q. Had you any experience in braking or switching or coupling before this time—before your employment as a night yard switchman?

A. No, sir.

Q. You say that your general health before this accident was always good?

A. Yes, sir.

Q. What was your weight before you were hurt?

A. 155.

Q. What is it now?

A. '37.

Q. You mean 137?

A. 137.

29 Q. When you arrived at consciousness you found yourself walking the floor?

A. That was the first time.

Q. How long was that after you were hurt, if you know?

A. I don't know.

Q. Did you suffer any pain from this injury?

A. I have suffered a good deal.

Q. Tell the jury all about it.

A. I suffered on both sides of my head and back part of my neck, whereas if I walked across the street alone I would have to go and sit down or bathe my head in cold water. Ever since then the pain is right there on both sides of my eyes, and just before the close of the evening you would find my eyes would change so that you wouldn't know that there was any eyes at all, and in the morning you can catch this one, after I get up, with your fingers.

Q. Have you had that pain ever since you were hurt or only at times?

A. Only at times.

Q. How frequently?

A. Every day in the week.

Q. Not all the time—continuously?

A. No, sir.

Q. Is your sight injured in any way that you know of?

A. Yes, sir; it is.

Q. Take off your glasses.

Glasses removed from eyes of witness.

Q. Look at the jury, and now tell the jury how your eyes are affected.

A. Well, they are affected so that I can only see the end man (indicating the nearest juror to witness), and I look up here and I can't see the end man (indicating the farthest juror from witness) at all, and whereas if I look at him about two seconds there will a glimmer come over my eyes so that I can't see at all. If there is a man walking across the street and I happen to see him, I can see two if there is only one man.

Q. How long has your eyesight been in that condition?

A. Ever since I got out of bed.

Q. Is your hearing effected in any way?

A. It is.

Q. In what way?

A. This ear here is just like somebody po-nding on the inside, and it keeps pounding all day and all night long, and there was about two weeks that I went and seen people about it.

Q. Have you any ailments in your body or limbs or arms?

Mr. WATSON: I object to that unless it is connected with this thing in some way.

By the COURT: You propose to connect it?

Mr. GLASPELL: Yes, sir.

A. I have.

Mr. GLASPELL, continuing:

Q. In what way?

A. From my hips down to my toes.

Q. When did you first notice that?

A. After I first got out of bed.
Q. After being hurt?
A. Yes, sir.
Q. Were you effected that way before July 6th, 1889?
A. I was not.
Q. How does that affect you?
A. It is just the pains that run up and down my legs; they seem to be so weak, as though there was no blood, and I have to fall down once in awhile.
Q. Do you fall down frequently?
A. I have.
Q. Are you able to walk any distance; if, so, how far?
A. I can walk two or three blocks, or something like that, but I can't walk any distance.
Q. Have you tried to walk?
A. Yes, sir.
Q. More than once?
A. Yes, sir.

Mr. WATSON: I want to add further objections that this testimony is inadmissable under the pleadings, and I now move to strike out all this testimony of the witness in reference to the injury to his legs.

By the COURT: Mr. Glaspell, you may enter it in the pleadings if you want to and count on this, and then the proof will correspond to the allegations. Consider it amended.

Mr. GLASPELL:

Q. How did this injury affect your general health?
A. Very bad.
Q. You tell us just exactly how; how were you different from the condition you were in before you were hurt?
A. Because I wasn't able to chew anything, any meat of any kind, until about four weeks after I got out of bed, and I haven't
31 got any more appetite than some little boy four years old.
Q. Can you whistle now?
A. I can't.
Q. Could you before you were hurt?
A. Yes, sir.
Q. What is the reason you can't whistle now?
A. I can't get my lips around in the right shape.
Q. Is it because your face is injured?
A. Yes, sir.
Q. Put your hand on that part of your face that is injured.
A. Right there.

(Witness indicates the right side of face, on the cheek.)

Q. Are you able to read print now?
A. I am not.
Q. Well, now, just tell—just look at that; what does that look like to you?

A. I have suffered a good deal.

Q. Tell the jury all about it.

A. I suffered on both sides of my head and back part of my neck, whereas if I walked across the street alone I would have to go and sit down or bathe my head in cold water. Ever since then the pain is right there on both sides of my eyes, and just before the close of the evening you would find my eyes would change so that you wouldn't know that there was any eyes at all, and in the morning you can catch this one, after I get up, with your fingers.

Q. Have you had that pain ever since you were hurt or only at times?

A. Only at times.

Q. How frequently?

A. Every day in the week.

Q. Not all the time—continuously?

A. No, sir.

Q. Is your sight injured in any way that you know of?

A. Yes, sir; it is.

Q. Take off your glasses.

Glasses removed from eyes of witness.

Q. Look at the jury, and now tell the jury how your eyes are affected.

A. Well, they are affected so that I can only see the end man (indicating the nearest juror to witness), and I look up here and I can't see the end man (indicating the farthest juror from witness) at all, and whereas if I look at him about two seconds there will a glimmer come over my eyes so that I can't see at all. If there is a man walking across the street and I happen to see him, I can see two if there is only one man.

Q. How long has your eyesight been in that condition?

A. Ever since I got out of bed.

Q. Is your hearing effected in any way?

A. It is.

Q. In what way?

A. This ear here is just like somebody po-nding on the inside, and it keeps pounding all day and all night long, and there was about two weeks that I went and seen people about it.

Q. Have you any ailments in your body or limbs or arms?

Mr. WATSON: I object to that unless it is connected with this thing in some way.

By the COURT: You propose to connect it?

Mr. GLASPELL: Yes, sir.

A. I have.

Mr. GLASPELL, continuing:

Q. In what way?

A. From my hips down to my toes.

Q. When did you first notice that?

A. After I first got out of bed.
Q. After being hurt?
A. Yes, sir.
Q. Were you effected that way before July 6th, 1889?
A. I was not.
Q. How does that affect you?
A. It is just the pains that run up and down my legs; they seem to be so weak, as though there was no blood, and I have to fall down once in awhile.
Q. Do you fall down frequently?
A. I have.
Q. Are you able to walk any distance; if, so, how far?
A. I can walk two or three blocks, or something like that, but I can't walk any distance.
Q. Have you tried to walk?
A. Yes, sir.
Q. More than once?
A. Yes, sir.

Mr. WATSON: I want to add further objections that this testimony is inadmissable under the pleadings, and I now move to strike out all this testimony of the witness in reference to the injury to his legs.

By the COURT: Mr. Glaspell, you may enter it in the pleadings if you want to and count on this, and then the proof will correspond to the allegations. Consider it amended.

Mr. GLASPELL:

Q. How did this injury affect your general health?
A. Very bad.
Q. You tell us just exactly how; how were you different from the condition you were in before you were hurt?
A. Because I wasn't able to chew anything, any meat of any kind, until about four weeks after I got out of bed, and I haven't
31 got any more appetite than some little boy four years old.
Q. Can you whistle now?
A. I can't.
Q. Could you before you were hurt?
A. Yes, sir.
Q. What is the reason you can't whistle now?
A. I can't get my lips around in the right shape.
Q. Is it because your face is injured?
A. Yes, sir.
Q. Put your hand on that part of your face that is injured.
A. Right there.

(Witness indicates the right side of face, on the cheek.)

Q. Are you able to read print now?
A. I am not.
Q. Well, now, just tell—just look at that; what does that look like to you?

(Witness shown the complaint in the case at bar.)

Q. Can you read any of that?
A. I can read—yes I can read a little of it.
Q. Well, read some of it.
A. "The defendant, in answer to plaintiff's complaint"——
Q. What is the matter now?
A. I see too many words; I don't know whether there is one or two.
Q. Does it become blurred?
A. Yes, sir.
Q. Can you see better with one eye closed?
A. I can.
Q. Which is your best eye?
A. The right eye.
Q. The right eye is the best eye?
A. Yes, sir.
Q. Now, look at it with your right eye alone; close your left eye; close your left eye, put your hand over it. Well, you have got your hand over the right eye.
A. Well, I had my right eye closed before.
Q. Well, read that.
A. "The Territory of Dakota sends greeting to The Northern Pacific Railroad Company, defendant."
Q. Are you unable to read it any more?
A. I can't see half the words.
Q. What takes place in that print after you have looked at it a moment or two?
A. Why, it seems to be all alike—all letters.
32 Q. This # 21 that you spoke of, was that a freight train of the defendant?
A. It was a freight train.
Q. Belonged to the Northern Pacific Railroad Company?
A. Yes, sir.
Q. Where did it come from?
A. From Fargo.
Q. How do you know that?
A. It was the way freight from Fargo.
Q. It came from the east somewhere?
A. Yes, sir.
Q. And this flat car that was loaded with lumber was in this way freight from the east?
A. Yes, sir.
Q. Did you loose any of your teeth on this occasion?
A. I lost the two on this side.

(Witness indicates the left side of his face.)

Q. The upper or the lower teeth?
A. The lower teeth.
Q. At the time you were hurt, what wages were you receiving?
A. $2.25 a day; I was working nights.

Q. O, $2.25 a night?
A. Yes, sir.
Q. As a call-boy, what wages did you rec-ive?
A. $1.50 per day.
Q. Have you done any work since you were hurt?
A. I have not.
Q. Have you been able to do any work?
A. No, sir.
Q. Have you earned any money since you were hurt?
A. Not one cent.

Cross-examination by Mr. WATSON:

Q. How long had you been in the employ of the defendant as a call-boy prior to your employment as a switchman?
A. Two years or two years and a half.
Q. Were you first employed as a call-boy at the round-house on the west side of the river?
A. No, sir; my first job for the Northern Pacific was working on the coal dock.
Q. In what capacity were you working there?
A. I was working under—Johnson was the foreman.
Q. What was the nature of your duties?
33 A. To unload box cars of coal and get them in the shed and load up engines when they came in there.
Q. How long were you employed in that capacity?
A. I worked there all one winter.
Q. That was before you became call-boy?
A. Yes, sir.
Q. You were in good health at that time?
A. Yes, sir.
Q. Able to make a full hand at that work—that kind of work?
A. Yes, sir.
Q. The same as other men?
A. Yes, sir.
Q. You were physically well at that time?
A. Yes, sir.
Q. How long were you employed in that capacity?
A. One winter.
Q. After that you became call-boy?
A. Yes, sir.
Q. Where were your headquarters as call-boy?
A. At the round-house.
Q. That is, during the first part of the time you acted as call-boy?
A. Yes, sir.
Q. How long were you there?
A. Pretty nearly two years.
Q. How far is the round-house from the headquarters building?
A. It comes pretty near being a mile.
Q. And the round-house is on the west side of the river?
A. Yes, sir.

Q. Where are these tracks upon which this switching was done, relative to the round-house?

A. On the south side of the main line.

Q. And between the round-house and the river?

A. Yes, sir.

Q. In what way did you usually go from your home over to the round-house?

A. Cut right across there until you strike the first water.

Q. Then go down the railroad tracks?

A. No, sir; I never walked on the tracks.

Q. Down Main street?

A. Yes, sir.

Q. Were you in the habit of riding on engines and cars between the round-house and the headquarters building during the time you were call-boy?

34

A. No, sir; not at all.

Q. Were you around in the yards at all when switching was done during that time?

A. No, sir.

Q. Never at all?

A. Just at certain times, when they would stop me when taking orders to the round-house.

Q. How stop you?

A. They would want to talk to me.

Q. Who would?

A. The foreman of the switching gang.

Q. Then you would stop and watch them switch?

A. Yes, sir.

Q. That was the only observation you ever made of switching prior to the time you became a switchman?

A. Yes, sir.

Q. You are positive of that point, are you?

A. Yes, sir.

Q. When was it you made this coupling or attempted to make this coupling on the Valley train?

A. Well, it must be just about a month and a half before I started switching.

Judge CALDWELL: Let me enquire what that has to do with this case?

Mr. WATSON: If it please the court, I intend to introduce it as having this important bearing on the case: The plaintiff sets up that he was young and inexperienced and totally unaware of the dangers of switching, and it was my intention to show that he volunteered to make this coupling and went outside of his duties as call-boy to make this switch, and he was warned by no less than two parties from coupling as a call-boy, and that he did not heed the warning.

By the COURT: Do you consider that a full-grown man—an adult man—seeks employment as switchman of a railroad company, and is given employment as a capable man, and is injured by reason of

his own capacity, that he has a demand from the railroad company because they have employed him?

Mr. WATSON: No, sir.

By the COURT: This man was not a minor; wasn't under guardianship; he was an adult and in the full possession of all his
35 senses, and he sought and obtained a position to do a particular duty. Now, suppose he is injured in the performance of that duty, is that a cause for action? We will hear the plaintiff upon that; just now I am with you. When a full-grown man applies for employment and accepts it, it don't lie with him if he is injured to turn around and say you ought to have known that I was not capable of doing the duties that I professed to discharge. No, I say, that as a full-grown man that is not a plea that will stand.

Mr. WATSON:

Q. Did you have any talk with Mr. Webber, the yard-master, regarding the duties of switching, after he employed you?

A. I didn't.

Q. Are you positive that you had no talk with him at all?

A. I didn't.

Q. Did you have any talk with Mr. Clemens regarding your duties as switchman?

A. I did.

Q. And in your talk he warned you of the dangers of your position, did he not?

A. No, sir; he did not.

Q. Is it not a fact that in that conversation he told you to be very careful in coupling cars in which there was projecting lumber?

A. No, sir; he didn't.

Q. You are positive of that?

A. I am positive of that.

Q. What did he say to you in that conversation?

A. He told me to be careful in coupling cars, but he didn't say anything about loaded cars.

Q. No one ever warned you of the danger in coupling those kind of cars?

A. No, sir.

Q. Did you ever see the rules of the company?

A. No, sir.

Q. Did you ever see a time card of the company?

A. Yes, sir; I have.

Q. When did you see that time card?

A. When I was call-boy.

Witness shown a paper.

36 Q. Is that a copy of the time card that you saw?

A. It is.

Q. You had possession of one of those during the time you were calling?

A. No, sir.
Q. Never at any time had possession of one of those time cards?
A. Just only when the trains were generally in and out of Jimtown; they would make up a time card and I would look it up in the book.
Q. When you had one of those in your hands?
A. Yes, sir.
Q. Where did you get that copy of the rules?
A. I got them from Mr. Webber.
Q. The yard-master?
A. He did give me the book, of course.
Q. He did?
A. Yes, sir.
Q. Where did he give it to you?
A. In the yard-master's office.
Q. And that became your book when he gave it to you?
A. Yes, sir.
Q. And you kept it?
A. Yes, sir; I did.
Q. How long was that prior to your employment as switchman?
A. About seven or eight days.
Q. Seven or eight days before you were employed as switchman Webber gave you one of those time cards?
A. I think it must have been seven or eight days. I don't know.
Q. What did you do with that time card?
A. After I knew the time trains were due, I don't know what I did with it. I never carried it two weeks' time altogether. I don't know how I came to lose it or anything about it. It was gone out of my pocket in less than two weeks.
Q. How much less?
A. I couldn't say.
Q. A day?
A. I couldn't say.
Q. Wasn't it within two or three days?
A. I don't know.
Q. He gave it to you about how many days before you were employed as switchman?
A. I think about two weeks; a little over a week and probably two weeks.
37 Q. Were you using a stick when you attempted to make this coupling?
A. No, sir.
Q. You were attempting to make it by hand, were you?
A. Yes, sir.
Q. What time of day was it when you went across to switch 21?
A. About seven o'clock.
Q. It was a little before seven, wasn't it?
A. I don't know.
Q. That was in the month of July?
A. Yes.
Q. Was the sun still shining at that time?

A. I don't think it was.
Q. It was still perfectly light, was it not?
A. Yes, sir.
Q. Your could see everything?
A. Yes, sir.
Q. It wasn't cloudy, and there wasn't anything to obscure your vision in any direction, was there?
A. There wasn't.
Q. Now, how many cars were there attached to the engine when it drew out from #5, switch #5?
A. The flat car loaded with lumber—well, I couldn't say the number.
Q. What was the last car that had been kicked into the switch prior to the kicking of the flat car loaded with lumber into #5? Was is not the box car which was upon #5?
A. The train was on #5.
Q. I mean #7.
A. No, sir.
Q. They didn't take the car out of 21 and put upon 7, you are are positive of that?
A. Yes, sir.
Q. So that it wasn't taken at that time?
A. It wasn't.
Q. Did you throw the switch for the switching of the flat car on #7?
A. I did.
Q. How far was the box car which stood on #7 from the switch on #7?
A. It was about ten or twelve rods.
Q. That would be 150 or '60 feet, would it?
A. Yes, sir.
Q. 150 or '60 feet, and you threw the switch there when
38 this flat car was sent out upon 7, did you?
A. I did.
Q. What did you do then?
A. I had just good time to go and set the pin in that car.
Q. As soon as you threw that switch you followed the car right up?
A. No, sir; I was ahead of it.
Q. Didn't you have to stand at the switch until the car past- onto the switch?
A. I did.
Q. How soon did the car come up on to the switch after you threw it?
A. The car was about a rod from the switch when I threw it.
Q. As soon as you threw it you past- down to this box car?
A. Yes, sir.
Q. And that was 150 feet from the switch?
A. Yes, sir.
Q. In what direction were you walking?
A. West.

Q. Did you run or walk?
A. Run.
Q. How fast?
A. About four miles an hour.
Q. How fast does a man walk ordinar-ly?
A. I couldn't say.
Q. Well, you went to the east end of the box car first, didn't you?
A. Yes, sir.
Q. Did you go clear up to the draw-head?
A. I did.
Q. Couldn't you have seen that there was no pin there?
A. I didn't go up in front of the draw-head; I ran up on the side of the track, and when I got near the car I seen there was no pin, and then I went right west of the same box car.
Q. How far did you go?
A. I didn't go any farther than the end of the car. I looked across the end of the car and there saw a pin.
Q. Did you know the length of that box car?
A. I think it was a 33-foot car.
Q. How far from the north side of the car did this pin lay?
A. About five or six feet.
Q. Out from the edge of the car?
A. Yes, sir.
Q. And you stepped up there and took up that pin?
A. I did.
39 Q. What did you do then?
A. I run to the east end of that car.
Q. You turned your face to the east?
A. Yes, sir.
Q. In what direction was the car loaded with lumber coming?
A. Coming west.
Q. You were coming east the length of that flat car, about thirty-three feet, and this flat car was going west, and you were facing it during the time that you were walking that distance?
A. Yes, sir.
Q. What were you looking at during that time?
A. I didn't have any time to walk during that time, so I didn't have any time to look at anything. I grabbed that pin and wheeled around and set the pin. That car was within eight feet of me when I picked up that pin from the ground.
Q. Then you travelled the distance of at least thirty-three feet while the flat car was traveling the distance of eight feet; is that right?
A. No, sir; when I was that thirty-three feet away from that car I never had time to make the distance only on the run. That car was about eight feet east of the box car.
Q. Now, you got in between the two cars before the flat car struck the box car?
A. I just got between them.
Q. I say, then, you travelled the distance of thirty-three feet or more from the point where you picked up that pin to a point

between the cars while the flat car was traveling that distance—eight feet?

A. I couldn't swear whether it was eight or ten feet.

Q. That car wasn't travelling very fast, was it?

A. It was coming down grade.

Q. Was it not up grade at that point?

A. It had come about to the up grade.

Q. This car at the time that it struck the box car was about at that grade?

A. Yes, sir; it was just about at the head of the grade.

Q. Which hand did you have the pin in?

A. The pin in the left hand and the link in the right hand.

Q. Where was the link?

A. In the flat car.

Q. What direction did you face when you went in between the box car and the approaching flat car?

A. I faced the south.

Q. Did you step inside of the rail?

A. I did.

Q. You said you weren't using a stick in making the coupling at all?

A. No, sir.

Q. Did you make it by hand?

A. By hand.

Q. How far did you step inside of the north rail of that side track?

A. #25.

Q. Did you step with both feet inside the rails?

A. Only one foot.

Q. Which foot was that?

A. The left foot.

Q. When you saw that those timbers were projecting did you simply back, or did you try to turn around?

A. I tried to spring out.

Q. Out backwards, or how?

A. Backwards.

Q. You didn't attempt to turn around?

A. No, sir.

Q. Is it not a fact, Mr. Everett, that you saw those timbers projecting over the end of the car before you ever went in there?

A. No, sir.

Q. You didn't see them until after you got in?

A. No, sir.

Q. How far had you got in before you saw them?

A. I had just got hold of the link of the flat car before I saw them.

Q. Didn't they project over the link?

A. Yes, sir; I got hold of the link, and that piece of timber was out even with the link or over the link.

Q. And you never saw that at all until you took hold of it with your hand?

A. I didn't.

Q. And you were facing south all that time?

A. I was.

Q. Did you not tell Charles Webber, the yard-master of the defendant, at or near Merrill's barber shop, some time in the month of August following this accident, that you saw those timbers before you went in to make the coupling, and tried to stoop down and make the coupling, and that you raised up your head too soon and was caught?

41 A. I didn't.

Q. You never made any such statement as that at all?

A. No, sir.

Q. Did you not, at or about the same time, make a similar statement to Dr. De Puy, of Jamestown?

A. I didn't.

Q. You made no such statement to him at all?

A. No, sir.

Q. Is it not a fact that you said to Dr. Du Puy, on or about that time, that you saw the timbers projecting over the end of the car, but that you were afraid the boys would laugh at you if you didn't make the coupling, and therefore you attempted it, and, failing to stoop low enough, was caught and injured?

A. I didn't.

Q. Did you see the flat car as it approached the box car while you were running with the pin?

A. I see the flat car coming towards me.

Q. Didn't you see what it was loaded with?

A. You could see it was loaded with lumber, but I couldn't tell that the lumber stuck over the car by facing the car.

Q. You were off to the north of the car as well as east of it, were you not?

A. No, sir; never to the north of it.

Q. Well, you have already testified that this pin was about eight feet north of the car when you found it.

A. Well, that is of the box car, but I wasn't eight feet north of the flat car.

Q. In the line which you took from the point where you picked up the pin to the point where you entered between the two cars, you would be going in a southeasterly direction, would you not?

A. Just about east direction.

Q. Just about east?

A. Yes.

Q. You say the pin was eight feet to the north of the car? You must have made up that eight feet somewheres.

A. I don't know which direction you call it—north, south, east, or west.

Q. You were going both east and south to get there?

A. I was.

Q. You were?

A. Yes, sir.

Q. When you went in between the cars, did you walk right in in a perfectly upright condition?

42 A. No, sir.

Q. In what position did you go in?

A. I went in and set the pin, and by that time I didn't know whethe- the lumber did stick over the car or not, but I thought I would get down, so that it wouldn't catch me.

Q. Had you thought it would stick over?

A. I thought it might. That is the first car I ever coupled.

Q. How soon did you think it might stick over?

A. Just as I went in.

Q. You thought then that it might project over?

A. I did.

Q. Couldn't you see that it did stick over?

A. No, sir.

Q. You couldn't?

A. No, sir.

Q. What prevented your seeing?

A. Looking right straight at the lumber, you couldn't see the bottom of the car.

Q. What prevented your seeing the bottom of the car? Couldn't you tell from the position of the draw-head that it was covered with lumber?

A. I didn't know anything about it whatever.

Q. Didn't you look at the link in the draw-head?

A. Yes, sir; but I couldn't se- the draw-head. A man must be blind if he couldn't see a draw-head with a link in it.

Q. Mustn't he have been blind not to have seen the lumber projecting?

A. No, sir.

Q. When did this thought first come to you about the lumber projecting over the car?

A. Just as soon as I went in between the cars.

Q. Then, did you attempt to stoop?

A. I just leaned myself on one side.

Q. How much did you bow yourself down?

A. I couldn't say. I didn't take any measurements. All I know is as I took hold of the flat car; that is all I know.

Q. You know that you made an effort to escape after that?

A. I dropped it and made one jump and got out.

Q. The lumber didn't catch you while you had hold of the link, did it?

A. No, sir.

Q. Did you get the link into the draw-head of the box car?

43 A. I couldn't say.

Q. Did you spring directly backward in your attempt to get out?

A. I did.

Q. You didn't stoop any then?

A. Of course you have got to get a stoop on you to spring.

Q. Did it catch you before or after you made the spring?

A. I don't know. I couldn't say; all I can say is that I was on the outside of the track, and if I didn't make that spring how could I get on the outside of the track?

Q. What kind of a signal was it Weitzel gave you that you understood to be to take care of the cars on # 7?

A. He yelled out "# 7."

Q. Where were you at that time?

A. I couldn't say.

Q. What were you doing at the time?

A. I don't know what I was doing either.

Q. Where was Keiran?

A. He was following the engine with Jack.

Q. Jack Weitzel?

A. Yes, sir.

Q. Were you nearer this # 7 than Keiren?

A. Yes, sir.

Q. And he called out # 7?

A. Yes, sir.

Q. And that was all the signal he gave you?

A. # 7, 4, and 5.

Q. That meant the first car was to go on 7, the next on 4, and the next on 5?

A. The next on 6.

Q. Those were the only signals or orders you received at all?

A. Yes, sir.

Q. In what part of the train, with respect to its east or west end, was this flat car, loaded with lumber?

A. Near the west end of the train.

Q. How many cars between it and the caboose?

A. I couldn't say.

Q. About how many?

A. They looked just about five or six cars.

Q. Where were you before this flat car was switched on # 7?

A. I couldn't say.

Q. Was not this flat care in your plain sight during that time?

A. I don't know.

44 Q. You weren't near it at all?

A. No, sir.

Q. You had no opportunity to see it?

A. None whatever.

Q. Have you tried to do any work since your injury?

A. I have.

Q. What have you tried to do?

A. Unload a load of hay.

Q. What else?

A. I have tried to pump water.

Q. What else?

A. That is all I have tried.

Q. These two things?

A. Yes, sir.

Q. How much of a load of hay did you unload?

A. About two hundred.
Q. Two hundred pounds?
A. Yes, sir.
Q. And pumped water?
A. Yes, sir.
Q. Those are the only attemps at work you have made?
A. Yes, sir.
Q. You are able to walk and be about?
A. Yes, sir.
Q. You are on the street every day?
A. Yes, sir.
Q. That sort of exercise doesn't seem to hurt you?
A. That seems to hurt me worse than work; I haven't any appetite.
Q. How much exercise do you take now?
A. I walk about all day long.
Q. And then don't have any appetite at all?
A. No, sir.

Redirect examination by Mr. GLASPELL:

Q. Did you attempt to get out as soon as you saw the lumber projecting over the end of the flat car?
A. I did.
Q. How fast was the flat car running?
A. It must have been coming a good four mile an hour.
Q. Did you notice any difference in the height of the draw-heads?
A. Yes, sir; there was.
Q. About how much?
A. About four inches' difference.

45 Recross-examination by Mr. WATSON:

Q. Did you attempt to get out from between those cars as soon as you thought the flat car might have a projecting load upon it?
A. Just as soon as I got hold of the link; that is what made me get out.
Q. What I want to know is, did you begin an attempt to get out from between those cars as soon as you thought that the flat car might be loaded with projecting timbers?
A. I didn't make any attempt to get out until I got hold of the link of the car.

Mr. Glaspell then offered and read certain depositions in evidence of witness THEODORE M. KEIRAN.

Direct Interrogatories on the Part of the Plaintiff.

Int. 1. State your name, age, residence, and occupation.
Int. 2. Have you lived in Jamestown, Stutsman county, North Dakota; and, if so, what was your occupation during that time?

Int. 3. Did you know William J. Everett, the plaintiff in this suit? If yes, how long have you known him, and what was his occupation while you knew him?

Int. 4. State what you know of his receiving an injury while coupling cars in the yards of the Northern Pacific Railroad Company at Jamestown, North Dakota. State all the particulars of the matter.

Int. 5. How long had Everett been engaged in the work of switching when the accident happened?

Int. 6. If you have testified that Everett was caught between a flat car loaded with lumber and a box car, state how the flat car was loaded.

Int. 7. If you have stated that the lumber on said car projected over the ends thereof, state how far it projected over each end.

Int. 8. How far, if any, distance did it project over the end where the accident happened?

Int. 9. How did you ascertain these distances?

Int. 10. You may state whether or not Everett saw or had any opportunity to see the flat car loaded with lumber before attempting the coupling. If you say he did not, state how you know that fact.

Int. 11. State whether the flat car was loaded in the usual or in an unusual way.

Int. 12. If you have stated that it was loaded in an unusual way, state in what particular.

Int. 13. State how long you have been engaged in the business of yard switching.

46 Int. 14. Did you see Everett at the time of the accident described or immediately thereafter? If yes, describe his condition at that time.

Answers to Direct Interrogatories on the Part of the Plaintiff.

T. M. KEIRIN sworn:

Ans. to Int. 1. Theodore M. Kierin; twenty-eight; Wallula, Walla Walla, Wash.; brakeman.

Ans. to Int. 2. Yes, sir; both brakeman and switchman.

Ans. to Int. 3. Yes; about six months. At first I knew him as call-boy, and then he started in as switchman with me about 28th June, 1889.

Ans. to Int. 4. On July 6th, 1889, we started to work at six o'clock p. m. switching the house cars, and after we got through switching the house cars we commenced switching # 21; that is the east-end local between Jamestown and Fargo. We went down and coupled on our engine and stood waiting for our orders from the foreman. He gave us a signal to back up and we answered it, and the engineer backed up. When the hind end of the cars came along the foreman called 5, 7, 6, and 4, to the best of my knowledge. I followed the engine and Will Everett worked in the field—that is, catching cars and coupling them. He threw the switch for # 7, and the cars were right on top of him; he run ahead of the

cars to set the pin to make the coupling, and before he could have had time to see the timbers sticking over, it caught his head; then we kicked two cars on # 6 switch. I ran after and caught them, for they were coming back again, and I set the brake on them and called over to the foreman that Will was hurt, and I went forward to help to pick him up; we carried him alongside of the cars. Repairer Shack and I went up and notified the yard-master of the accident to Will. It was a flat car loaded with timber that he went to couple to a box car; the timber stuck over twenty-two inches.

Ans. to Int. 5. About nine days.

Ans. to Int. 6. The flat car was loaded in an unusual manner, with timber loaded over the end so as to project 22 inches.

Ans. to Int. 7. The lumber projected 22 inches over the end Will was caught; did not project over other end.

Ans. to Int. 8. 22 inches.

Ans. to Int. 9. I measured them before the car was moved.

Ans. to Int. 10. Everett did not have a chance to see the flat car, for he was was running ahead to throw the switch and the car was right on him. I was watching them.

47 Ans. to Int. 11. In an unusual way.

Ans. to Int. 12. The lumber projected 22 inches over one end.

Ans. to Int. 13. About three years.

Ans. to Int. 14. No; not at the time, but immediately thereafter; he was lying alongside of the rail, with his face to the ground; he was bleeding out of his nose, mouth, and ears, and in an insensible condition.

(Signed) THEODORE M. KIEREN.

Cross-interrogatories to be Propounded to J. T. Kieren.

No. 1. State what time of day it was when the accident occurred.

No. 2. Did you personally witness the accident to the plaintiff, and what distance was there between you and him when the same occurred?

No. 3. State if there was sufficient daylight at that time to enable plaintiff to see whatever took place in front of him.

No. 4. State what plaintiff was doing just before the accident occurred.

No. 5. State what plaintiff was doing at the time of the accident.

No. 6. State if it is not a fact that the plaintiff received his injury after he made or attempted to make the coupling between said cars.

No. 7. State how long the cars causing the accident had been in the yard prior to the accident.

No. 8. State if plaintiff prior to the accident had been working round said yard.

No. 9. If you have answered the previous cross-interrogatory in the affirmative, state if plaintiff had an opportunity to see the cars causing the accident.

No. 10. State whether the plaintiff, when he attempted to make

the coupling, could have seen by looking at said cars that the timbers with which the flat car was loaded projected over the end thereof.

No. 11. Did plaintiff at the time of the accident know that the timbers upon the flat car projected over the end thereof?

No. 12. Did plaintiff prior to the accident make any examination of said cars?

Answers to Cross-interrogatories Propounded to J. T. Kieren.

48 Ans. to #1. Between 6 and 7 p. m.

Ans. to #2. No; one hundred and forty feet.

Ans. to #3. Yes.

Ans. to #4. He was running to set his pin to make coupling.

Ans. to #5. Making the coupling.

Ans. to #6. He received his injuries in attempting to make the coupling.

Ans. to #7. About half hour for the flat car; I don't remember about the box car.

Ans. to #8. Yes.

Ans. to #9. No.

Ans. to #10. I do not know.

Ans. to #11. No.

Ans. to #12. No.

(Signed) THEODORE M. KIEREN.

MATILDA EVERETT, a witness produced on the part of the plaintiff, having been duly sworn, testifies as follows:

Direct examination.

Mr. GLASPELL:

Q. What is your full name?

A. Matilda Helen Everett.

Q. Are you related to the plaintiff in this case?

A. Yes, sir.

Q. How?

A. His sister.

Q. Were you living home on July 6th, 1889?

A. Yes, sir; I came home for a vacation. I had been teaching school, and came here and stayed with him, and came home to spend the Fourth of July and remained here.

Q. Describe his appearance when you first saw him.

A. He was brought home and put to bed, and he lay there a month or five weeks. He was brought home insensible; he was bleeding badly at his mouth, nose, and ears.

Q. Did you attend to him during that time?

A. Yes, sir; I was with him constantly.

Q. You say he was insensible all that time?

A. Yes, sir.

Q. What was the appearance of his eyes when brought home?

A. One eye was black and blue, and the other seemed to be per-

fectly well. The one that is now inflamed was the one that was apparently well.

Q. When did they assume that flushed appearance?

49 A. Well, I don't know; it was two or three days after he was brought home.

Q. Did his eyes protrude from his head when he was brought home?

A. No, sir.

Q. When did they assume that appearance?

A. Just before he got out of bed we noticed them, but not to any extent till he got out.

Q. Did he appear to suffer any pain?

A. He seemed to be in agony all the time. He was constantly wanting to get up and he was kept there as much as possible.

Q. After he arrived at consciousness, which you say was four or five weeks, how long was he confined to the house?

A. Before we could dress him it was four or five weeks.

Q. Why couldn't you dress him?

A. Because we were afraid to let him out. He was not rational, apparently, all the time and there was some one always watching him when he went out.

Q. How long was he in that insensible condition?

A. Three or four weeks.

Q. Have you lived at home since that time?

A. Yes, sir; I have been with him most all of the time.

Q. Have you noticed any change in his mental condition since the accident?

A. Yes, sir; he has not the reason that he had before and his mind is not as well as it was; his memory is about entirely gone.

Q. Has he behaved in a strange or unusual manner at any time?

A. He never behaved as well as he did before.

Q. Do you know whether he has been able to work since he was injured or not?

A. No, sir; he has not.

Q. Have you ever seen him attempt to work?

A. I have seen him attempt to pump water and get tired out before he would get half through.

Mr. WATSON: No cross-examination.

ADELBERT BINGHAM, a witness produced on the part of the plaintiff, having been duly sworn, testified as follows:

Direct examination.

Mr. GLASPELL:

Q. What is your full name?

A. Adelbert Bingham.

Q. Are you acquainted with the plaintiff in this case, William J. Everett?

50 A. Yes, sir.

Q. Did you know of his meeting with an accident at Jamestown on July 6th, 1889?

A. Yes, sir; I see him that evening; yes, sir—not that evening, but the next day; and they said he was hurt, and I also———

Q. Did you make any examination of a certain car which was said to have injured him?

A. Yes, sir.

Q. At whose request?

A. At your request.

Q. Mr. Glaspell's?

A. Yes, sir.

Q. Where was that car?

A. Up at the company's lumber yard.

Q. What kind of a car was it?

A. A flat car about thirty feet long.

By the COURT:

Q. Did you measure it?

A. Yes, sir; I did.

Mr. GLASPELL:

Q. Did you make any memorandum of the measurements at that time?

A. Yes, sir.

Q. Have you that memorandum?

A. I believe I have.

Q. Will you produce it?

A. Yes, sir.

Memorandum produced.

Q. Can you state after examining your memorandum to what road that car belonged?

A. N. P.

Q. You know the number of the car, I believe?

A. It was 21192, I think.

Q. What was it loaded with?

A. Bridge timber—that is, the foreman that was unloading it said that it was bridge timber.

Q. What did it look like?

A. Heavy square timber.

Q. In what lengths was the timber?

A. Sixteen feet.

Q. How was it loaded on the car?

A. In two lengths.

Q. About how high on the car?

A. About four feet, I think.

51 Q. What did you measure the car with?

A. I had a measuring stick, a three-foot rule.

A. Did you notice whether the lumber projected over the end of the car?

A. Yes, sir; it did.
Q. Did you measure that?
A. Yes, sir; I had a stick that I put up at the end of the car and cut a notch in it.
Q. Did you measure the lumber at the west end of the car?
A. Yes, sir.
Q. Did you se- any marks on the timber that would indicate anything?
A. Yes, sir; I saw some hair.
Q. How long did the timber project over the car?
A. About twenty inches.
Q. Have you the stick that you measured the projecting lumber with?
A. Yes, sir.
Q. Will you produce it?

Stick produced.

Q. Show the jury the length of the projection.
A. There is the end of the car; the lumber stuck that much over the end of the car—this notch; I cut it in when I was there; and the foreman of the crew was there and another man who is dead now, and my brother was there. The foreman of the crew was there and showed me the hair.
Q. What were they doing with that timber on the car?
A. Unloading the timber.
Q. At what place?
A. At the N. P. lumber yard.

Cross-examination.

Mr. WATSON:

Q. Upon what day, with reference to the accident to the plaintiff, did you make this examination?
A. The next morning after the accident.
Q. What time in the morning?
A. About eight o'clock.
Q. The accident, then, occurred about seven o'clock one evening and you made this measurement in the neighborhood of eight o'clock the following morning?
A. Yes, sir; some time about that time.
52 Q. At whose request did you make it?
A. Mr. Glaspell's, the attorney for the plaintiff.
Q. Any one else request you to make it?
A. I don't think they did.
Q. How do you know that this was the particular car that did the injury to the plaintiff?
A. Well, I know the foreman of the gang that was unloading it said it was, and also a switchman said it was, and I saw the hair on the end of the timber.
Q. On which timber was that hair?
A. On the timber on the north side of the car.

Q. And the timber that was lying immediately on the top of the car?
A. Yes, sir.
Q. It was in the lowest tier, then?
A. Yes, sir.
Q. This hair was also on the outside of the timber?
A. Yes, sir; on the end of it.
Q. And it was on the lower outside corner?
A. Well, I think it was.
Q. On the lower outside corner—the hair that you saw?
A. Well, I think it was in the middle of the timber.
Q. It was on the outer edge of it?
A. Near the middle of the timber.
Q. What was the size of that timber?
A. I think about twelve inches square.
Q. And the hair that you saw was somewhere near the middle of that stick of timber?
A. Yes, sir.
Q. And that timber was the lowest stick of timber on the north side of the car?
A. I believe it was.
Q. You saw nothing upon that timber except a little hair?
A. No.
Q. No blood, was there?
A. No, sir.

The plaintiff now offers in evidence the deposition of Michael Tay, which is read; the deposition of Jane Everett, the deposition of Henry J. Porter, and the deposition of Elmer Merill, all of which were read to the court and jury.

One of the jurors at this point desiring to be informed by the witness, Matilda H. Everett, if the memory of the plaintiff was good concerning anything that transpired before the accident in question, the court directs that said witness be recalled.

53 Circuit Court of the United States, Eighth Circuit, District of North Dakota.

WILLIAM J. EVERETT, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Testimony.

On the 15th day of April, A. D. 1890, at ten o'clock in the forenoon, at the office of Edgar W. Camp, in the Doolittle block, in the city of Jamestown, in the county of Stutsman and State of North Dakota, the plaintiff appeared by his attorney and the defendant by its attorney, John S. Watson, and, pursuant to a notice, certain depositions were then and there taken as follows:

JANE EVERETT, a witness called for the plaintiff, being first duly sworn, doth depose and say:

—. What is your name, age, and place of residence?

A. My name is Jane Everett; my age is fifty-four years, and my residence is Jamestown, Stutsman county, North Dakota.

Q. Are you related to the plaintiff?

A. I am his mother.

Q. Give the date of his birth.

A. March 26th, 1865.

Q. Is he a member of your family?

A. He is.

Q. And now living with you?

A. Yes, he has always lived with me.

Q. When did you first see him after meeting with an accident on July 6th, 1889?

A. What time in the evening I couldn't tell; I saw him the same night, but what time I don't know.

Q. Where did you first see him, and describe his condition at that time.

A. I saw him in bed; his condition was hopeless; it is almost impossible to describe. When I saw him the blood was coming from his ears, nose, and mouth, and his clothes were saturated with blood all over. He was not conscious; he knew nothing of what was going on around him for four weeks.

Q. Were you in attendance on him during that time?

A. I was with him constantly, except when I lay down to get some rest.

Q. How did he act during that time?

A. Sometimes as a maniac; I can't describe it hardly, how he did act.

54 Q. What was the appearance of his eyes during that time?

A. They were red, blood-shot, and swelled up and looked like they were bunged out of their sockets. His right eye was the one injured; that was perfectly black when he was fetched home and was for several days afterwards. The right eye appeared to crowd over on the left eye, so as to injure the left eye. His eyes are both bad at present.

The defendant moves to strike out all of the last answer for the reason that the same is incompetent, and the witness has not been shown to be qualified to testify as a medical expert.

Q. For how long a period was he confined to his bed?

A. He was four weeks in bed; during his insanity fits he had to be out on the couch.

Q. How long was he confined to the house after the four weeks you have spoken of?

A. He was not confined to the house; Dr. Du Puy took him out before he was fit to be taken out.

Q. How long after he was hurt was it before he was able to walk away from the house alone?

A. It was not five weeks.

Q. What was the condition of the plaintiff physically and what was the condition of his general health before July 6th, 1889?

A. Well, to the best of my knowledge, he was always well; the only thing he ever complained of was the nose bleed, up to that time.

Q. Was he sound mentally before that time?

Objected to as incompetent, the witness not being shown to be qualified to testify as an expert.

A. He was before he was hurt.

Q. Before he was hurt did he act and behave himself as a sensible person?

Same objection as last above.

A. To the best of my knowledge, I never found anything otherwise than sensibleness; never.

Q. Describe the difference between his actions in that regard before and after July 6th, 1889.

Objected to as incompetent, the witness not being shown to be qualified to testify as a medical expert in the case.

A. Before July 6th he was very reasonable, but since that time he has been irratable and sometimes unreasonable in talking; he lacks firmness, so that it keeps us constantly on our guard not to provoke him to anger. I think he is a boy used up.

55 Q. Describe any other conduct you have noticed since his injury indicating a want of sense.

Same objection as last above.

A. I have seen nothing.

Q. What, if any, work has he done since his injury?

A. None.

Q. What is the state of his general health at this time?

Objected to as last above.

A. He loses his appetite at times. By his walking he indicates a lack of blood in his veins; it seems to me so.

Q. Is there anything the matter with his head now; if so, what?

Same objection as last above.

A. I can't tell.

Cross-examination:

Q. What is the weight of your son now as compared to what he was before the accident?

A. He was 150 before he was hurt; I know he is less than 140 now, but I don't know exactly.

Q. How long had he been affected with his bleeding at the nose?

A. I think about six months before the accident; not constant bleeding, only just once in awhile. He never would tell me when anything ailed him.

Q. How frequently, to your knowledge or information, would his nose bleed during that time?
A. I can't tell.
Q. Would you say frequently or otherwise?
A. It did, frequently.
Q. Would the bleeding continue for a good while each time?
A. That I cannot tell.
Q. Did you consult any physician concerning the same?
A. He did; Dr. Du Puy.
Q. Who treated your son professionally immediately after the accident?
A. Dr. Rankin.
Q. How long did he treat him?
A. About four weeks.
Q. Who, if any one, treated him after that?
A. Dr. Du Puy.
Q. How long did he treat him?
A. I could not say exactly; about eight or ten days.
Q. Any other physician treat him after that?
A. No.

Redirect.

(Signed) JANE EVERETT.

55½ Subscribed and sworn to before me this fifteenth day of April, A. D. 1890.

(Signed) EDGAR W. CAMP,
Notary Public, Stutsman County, North Dakota.

MICHAEL TOAY, a witness called for the plaintiff in the above-entitled action, being first duly sworn, testifies as follows:

Q. State your name, age, residence, and occupation.
A. My name is Michael Toay; I live on the farm at Captain Farrell's, in Stutsman county, North Dakota; I am foreman on the farm there; I am 25 years' old.
Q. Are you acquainted with William J. Everett, the plaintiff; and if so, how long have you known him?
A. Yes; I have known him three or four years.
Q. Did you know of his being hurt in the Northern Pacific yard, in Jamestown, July 6th, 1889?
A. Yes.
Q. State all you personally know about that occurrence.
A. The first that I saw of him was in the baggage-room; they took him out of a caboose and brought him in there, and we thought he was dying at the present time, and they soon afterwards took him home; that is about all I seen of him that evening.
Q. What was your business at that time?
A. I was night watchman for the railroad.
Q. For the defendant, Northern Pacific Railroad Company?
A. Yes.

Q. How long had you been such night watchman?
A. About three months at that time.
Q. How long were you in that business altogether?
A. About eight months.
Q. State whether or not you saw the car or cars where Everett was injured.
A. I did.
Q. How soon after the accident?
A. I should judge about half an hour.
Q. Where were they?
A. Standing in the yard, on one of the switches.
Q. Where, with reference to the tool-house?
A. They were standing a little northwest of the tool-house—nearly opposite—that is, the car-repairer's shop.
56 Q. What kind of cars were they?
A. One was a flat car loaded with timber and one was a box car.
Q. How were they standing when you arrived at the scene?
A. They were not coupled.
Q. Did any person go with you to the scene of the accident?
A. No; there were men there, but they did not go particularly with me.
Q. Describe the manner in which the flat car was loaded with bridge timber.
A. It was overloaded at both ends; the timber stuck over the draw-heads at both ends.
Q. How far did the timber stick over the draw-head at the west end of the flat car?
A. I could not exactly say; I should say six or eight inches beyond the draw-head.
Q. State as near as you can the length of the draw-head in inches.
A. I forget how long they are. The draw-head must be six inches outside of the timber, and there is a block on there that must be six or eight inches.
Q. Was the draw-head of this car more than a foot in length?
A. Yes; the draw-head and timber was.
Q. What kind of timber was the car loaded with?
A. I should suppose they were bridge timbers; they were heavy timbers.
Q. Did you find any blood on the timbers?
A. No, I did not see any blood; I saw hair and some hide that was knocked off his head on one of the timbers.
Q. What duties had you to perform in the freight yard at and before this time?
A. I had to walk around the yard and see that none of the cars were opened—nothing carried away.
Q. State whether or not you were fam-liar at that time with the method of loading cars with lumber.
A. I have seen a good many go through loaded.

Q. Was the car you have described, the flat car, loaded in the usual or an unusual manner?

Q. I should think in an unusual manner.

Q. Describe wherein the manner in which it was loaded differed from the usual method of loading flat cars with lumber.

A. The usual way is to have the lumber on the cars not sticking over the ends.

Q. Was that the usual way lumber was received in the Northern Pacific yard at Jamestown?

57 A. To the best of my knowledge.

Cross-examination:

Q. Have you ever been employed by the defendant in Jamestown in other capacity than that of night watchman?

A. Not in the last year, I have not; yes, I have been.

Q. How?

A. I helped to cultivate trees one spring.

Q. Is that all of your experience in working in and about rail roads?

A. I worked on the coal-sheds about a month; that is all the railroading I ever done.

Q. You have never been engaged in coupling, switching, braking, or handling in any manner freight cars on any railroad?

A. No.

Q. Did you always, during the time you were employed as a watchman, prior to the accident, take particular notice of the manner in which each car of lumber you saw on the road was loaded?

A. No; I did not take particular notice of every car I saw.

Q. Had anything occurred prior to the accident to call your attention to the manner of loading cars with lumber?

A. No.

Q. What was the size of the timbers with which the car was loaded?

A. I don't know exactly; they were over a foot wide, and how thick I could not say—eight or ten inches. They were laid lengthwise in the car.

Q. How many layers deep were they?

A. I could not say; four or five—perhaps more.

Q. Was it one or all the layers which projected over the west end of the car?

A. I th-nk they all projected over, but some not so much as others.

Q. Timbers in the lowest layers projected the most, did they not?

A. I could not say they did; they were about the same.

Q. Was there another car coupled onto this flat car to the east?

A. I don't remember.

Q. Give the section and quarter section on which you reside.

A. I don't know it; it is where Capt. Farrell lives; it is a little southwest of here—about three miles.

Q. How do you know that the car which was loaded with timber

and which you have described, was the one from which plaintiff received his injury?

A. I saw where the timbers had struck his head, and there was some men there who said that was the car he tried to couple.

58 Q. You had no other knowledge that that was the car except what you derived from what somebody told you, had you?

A. I saw the hair on the end of the timber.

Q. You don't know that that was his hair, do you?

A. No.

Redirect:

Q. How many persons were around the cars you mentioned when you examined them?

A. Three or four were there.

Q. What doing?

A. Looking at the car—measuring it.

Q. Measuring what?

A. The lumber that was over the end.

Q. Was there any crowd around any other car in the yard at that time?

A. Not that I seen.

(Signed) MICHAEL TOAY.

Subscribed and sworn to before me this fifteenth day of April, A. D. 1890.

(Signed) EDGAR W. CAMP,
Notary Public, Stutsman County, North Dakota.

Adjourned to half past two o'clock in the afternoon of same day, at same place.

Pursuant to adjournment, the taking of depositions is now, at half past two o'clock in the afternoons, April 15th, 1890, at the same place, continued.

HENRY J. PORTER, a witness called for the plaintiff, being duly sworn, says:

Q. What is your name, age, place of residence, and occupation?

A. I am Henry J. Porter; my place of residence is Jamestown, Stutsman county, North Dakota, and my occupation is handling lumber and book-keeper for J. R. Winslow, Jamestown; my age is 49 years.

Q. How long have you been engaged in handling lumber at Jamestown?

A. About eight years.

Q. Shipped over what railroad?

A. The Northern Pacific.

Q. Have you received and unloaded a great many cars at Jamestown during that time?

A. Yes.

Q. About how many?

A. Probably a thousand.

Q. State the usual method in which such lumber was loaded on flat cars.

59 A. There is usually two lengths, if the lumber is not too long; some part of our timber has been so long as to require two cars.

Q. When lumber was received that was longer than one car, how was it usually loaded?

A. On two cars.

Q. Have you, in your experience, received a car-load of lumber with two lengths of sixteen-foot stuff loaded on a thirty-foot car?

A. No.

Q. How is sixteen-foot stuff usually loaded on a thirty-foot car?

A. If there is only one length of lumber sixteen foot they usually make it one tier.

Q. Is sixteen-foot lumber as it comes from the mills always exactly sixteen feet long?

A. Some lumber is not trimmed and will be seventeen feet long.

Q. Have you personally superintended the receiving and unloading of the thousand cars of lumber you speak of?

A. Probably four y-ars out of the eight, between four and five, I have.

Q. To what extent for the balance of that time?

A. The balance of the time I was engaged in the office principally. I worked in the yard in the year 1882, 1887, 1888, and 1889, and part of the time in the other years.

Q. Is it a usual or an unusual thing to receive cars at this station with the lumber projecting twenty inches over the ends of the cars?

A. Unusual. I may say I never saw but one such car, and that had been in an accident where the lumber was driven through the end of a box car that was fastened to it.

Cross-examination:

Q. What proportion of the thousand cars of lumber about which you have testified were box cars and what proportion were flat cars?

A. In the year 1882 probably two-thirds of the cars we got were loaded on flats; the last few years it is mostly loaded in box cars.

Q. The lumber received by you in the first six months of 1889 was almost exclusively in box cars, was it not?

A. Yes.

Q. And the same thing was true of the most of the lumber received in your yard in 1888 also?

A. Probably from 1884 to the present time the largest per cent. of it was in box cars.

Q. How many car-loads of timber twelve by twelve or larger in size did your yard receive during the y-ar which ended July 6th, 1889?

60 A. I don't think we received but one car last year that was twelve by twelve or over.

Q. Was that in a box car or in a flat?

A. On a flat.

Q. How many flat cars loaded with that kind of timbers have you observed on this road during the last two years?

A. I don't know as I could hardly make an estimate; the most cars I have seen going through were those belonging to the railroad company, shipped in for bridge purposes.

Q. Did you ever have, prior to July 6th, 1889, your attention particularly directed to the manner in which such cars were loaded?

A. I kn-w that I have seen cars go through here that had timbers on that was probably sixteen to eighteen feet long, loaded with one tier, and I have seen many of them.

Q. Did you ever notice any such cars where the timbers projected over the ends?

A. I have never noticed any.

Q. Did you ever notice such cars in cases where two of them would be loaded in such a way that the space between them would be entirely taken up with the projecting ends of the timbers?

A. I have not, unless a portion extended over to another car, where the timbers were too long for one car.

Redirect:

Q. During the eight years you have been in the lumber business has such business been located on the right of way of the Northern Pacific railroad?

A. Yes.

Q. And where you could see all passing trains?

A. Yes.

Q. And all the trains coming into Jamestown from the east?

A. Yes; if they came in in daylight.

Recross:

Q. Is there a window in your office from which you can see every train that comes in on the Northern Pacific?

A. Yes; if I should go to the window, but I don't always go to the window; I don't spend all my time looking at the trains.

(Signed) HENRY J. PORTER.

Subscribed and sworn to before me this fifteenth day of April, A. D. 1890.

(Signed) EDWARD W. CAMP,
Notary Public, Stutsman County, North Dakota.

61 REUEL A. SANFORD, a witness, being called for the plaintiff, being first duly sworn, testifies as follows:

—. What is your name, age, place of residence, and occupation?

A. My name is Reuel A. Sanford; my age, 27 years; my residence is Jamestown, Stutsman county, North Dakota, and my occupation, night clerk on the Dakota division of the Northern Pacific railroad.

Q. Were you night clerk on July 6th, 1889?

A. Yes; I was on the night Everett was hurt.

Q. Did you examine the car which was said to have struck him?

A. No.

Q. Did you take the number of the cars of the train by which Everett was hurt?

A. I took the seal report of it; I can't say positively whether I took the numbers or not.

Q. What is the seal report?

A. Reporting the seal numbers and rivet numbers and the condition of same.

Q. Have you any way of finding out whether you took the numbers of the cars that night?

A. I could by examining the record.

Q. Will you please to examine the records in the car-checker's office and ascertain the numbers and marks on said car indicating to what company it belonged and the length of the car?

A. That would not be possible.

Q. I want further to ascertain the contents, the shipper, and consignee of such car. Now, will you please examine your records and ascertain whether or not such information is therein contained?

A. We don't have anything to do with consignor or consignee. I have got no record to show what car it was.

Q. Produce the record and entries made by you regarding the train which was said to have injured the plaintiff on the night of July 6th, 1889.

A. All I could do would be to give a copy or something of that kind, by being informed what train it was, if I had the book.

Q. I now inform you it was the first freight train that arrived in Jamestown after six o'clock, while you were on duty, on the night of the 6th of July, 1889, and I now ask you to produce the record kept by you of all the trains from six o'clock in the evening of July 6th, 1889, to twelve o'clock midnight of same day or a copy thereof.

A. It would take at least an hour and a half or two hours to go through four or five hundred books, even if I could get at them.

62 Q. Will you make the attempt to secure the information?

A. I don't know as I care to spend three or four hours looking it up and then take the chance of getting run over in the yard for want of sleep.

Q. Do you refuse to make the examination?

A. If you have the books here I will tell you whether or not I put the numbers in it or not.

Q. (Question repeated.)

—. ——.

Q. Please to examine your records and ascertain whether or not N. P. car 21172 was in such train.

A. I think the best way to get that would be to get the regular custodian of the books.

Q. Are you at liberty to look at those books?

A. I am at liberty to look at them when I am using them.

Q. Are you at liberty to look at them this afternoon?

A. I could not say with any degree of certainity that I am, because I am not on duty at the present time.

Q. Who is the custodian of those books?

A. They are — the charge of three or four different parties.

Q. Please to state their names.

A. They might be under the agent, the superintendent, or the yard-master, or the day clerk, either; so far as the regular custodian is concerned, I don't know.

Q. Will you make an attempt to examine said books for such information?

A. I don't know as I would have a right to go in there and attempt to; they are not in my charge.

(Signed) REUEL A. SANFORD.

No cross-examination

Subscribed and sworn to before me this fifteenth day of April, A. D. 1890.

(Signed) EDGAR W. CAMP,
Notary Public, Stutsman County, North Dakota.

Attorney for plaintiff disclaims any responsibility for refusal of last witness.

Adjourned to 10 o'clock a. m., April 16th, 1890, at same place.

(Signed) EDGAR W. CAMP.

63 ELMER MERRILL, a witness called for the plaintiff, being first duly sworn, testifies as follows:

Q. What is your name, age, place of residence, and occupation?

A. My name is Elmer Merrill; my age is thirty years; residence is at Jamestown, North Dakota; my occupation is barber.

Q. Are you acquainted with the plaintiff, and, if so, for how long?

A. Yes, I am acquainted with him, and have been for some seven years.

Q. Were you intimately acquainted with him during that time or otherwise?

A. I was intimately acquainted with him.

Q. Were you at one time a member of a base-ball club to which Everett belonged?

A. Yes.

Q. Do you know of his being injured about July 6th, 1889?

A. Yes.

Q. Did you see him the same day or night?

A. I saw them carrying him home on a stretcher past the shop; he was covered up, so I did not see him.

Q. Have you seen him frequently or otherwise since he was injured?

A. Frequently.

Q. State if you visited him during his illness following such accident.

A. I was there the next day after he got hurt and stayed with him all night, and again a week or so after that.

Q. Was he conscience or unconscious during that time?

A. Unconscious.

Q. Describe the appearance of his head and face during that time.

A. The Sunday I was up there his head was all blood; I could not tell much about it; they had not got him dressed yet.

Q. Have you met and conversed with him often since that time?

A. Yes.

Q. State what, if any, difference you have noticed in his actions, conduct, and conversation before and after such accident.

Objected to as incompetent for the reason that witness has not been shown qualified to testify as an expert.

A. Well, he is not as bright as he was before he got hurt; he don't talk like he used to at all; he gets talking about one thing and will change off onto another entirely different from what he was talking about.

Q. Have you noticed anything peculiar in his conduct since the accident, and, if so, what?

64 Same objection as last above.

A. No; I have not paid much attention to his conduct.

Q. From your knowledge of him, is it your opinion that his mental faculties have been injured or impaired since said accident?

Objected to as last above.

A. Yes; I think they have.

Cross-examination:

Q. Prior to July 6th, 1889, Everett was unusually bright, active, and intelligent, was he not?

A. Yes.

Q. He was quick and ready in all his movements?

A. Yes.

Q. You would consider him above the average in that respect?

A. I don't know if he would be above the average or not.

Redirect:

Q. Since July 6th, 1889, has he been bright or active?

A. I don't think he has.

Q. Or quick or ready in his movements?

A. No.

(Signed) E. L. MARRELL.

Subscribed and sworn to before me this 16th day of April, 1890.

(Signed) EDGAR W. CAMP, *N. P.*

At ten o'clock in the forenoon of the 16th day of April, 1890, at the same place, the hearing proceeded in pursuance to the adjournment.

GROVES H. COWLES, a witness called on behalf of the plaintiff, being first duly sworn, testifies as follows:

Q. What is your name, age, and place of residence and occupation?

A. My name is Grove H. Cowles; my age is 58 years, and my occupation is cigar-maker, and I reside at Jamestown, North Dakota.

Q. Are you acquainted with the plaintiff; and, if so, how long?

A. I am acquainted with him, and have been for four or five years.

Q. What do you know of his being hurt in July, 1889?

A. I know I was coming along Fifth avenue, near the depot, and I saw a crowd on the platform, and I went to the crowd at the baggage-room, and they had just taken this man Everett into the baggage-room; I saw him—looked at him—but he was so covered with blood that he was hardly recognizable; I could hardly bear to see him in that state and I started immediately to get the information to his parents.

Q. Were you well acquainted with Everett before that time?

65 A. Yes.

Q. Had you met and conversed with him frequently before?

A. Yes.

Q. Were you well acquainted with him and his habits and conduct before that time?

A. Well, I can't say in regard to his habits; so far as I know personally, I know nothing wrong; I was well acquainted with him.

Q. Have you known him intimately or otherwise since the accident?

A. Since he has been able to be out of the house I have seen him almost daily.

Q. Talked with him frequently?

A. He has been in my shop a great many times, staying sometimes an hour or more at a time, and I have talked with him on various subjects.

Q. State what, if any, difference you have noticed in his actions, conduct, and conversation after and before said accident.

Objected to as incompetent, for the reason that witness has not been shown to be qualified to testify as an expert.

A. Well, I have noticed a vast difference; in one thing that he could not seem to hold a conversation on one subject but a very little while; his mind seems to be wandering. As I have often said, there was no use to talk to him, because that he could not remember one thing but a short time. He seems to be uneasy all the time in his mind. Sometimes talking to him on any subject, I might ask him a question and instead of getting an answer he would commence talking on some different subject entirely. In regard to

his actions, he seems to be very impulsive, and changing from one subject to another, and quite restless also; is not satisfied to remain in one place long at a time. I think that is about all.

Q. In what respect does this differ from his actions and conversation before he was injured?

Objected to for same reason as last above.

A. Before his injury, at any time that I have conversed with him he always seemed to converse right along the same as any person; he did not have that appearance of his mind wandering so much.

Q. Did you visit him during his sickness?

A. I did not visit the house.

Q. From your knowledge of Everett, is it your opinion that his mental faculties are impaired or injured?

Objected to as last above.

A. Yes; it is.

Cross-examination:

66 Q. Prior to the accident in July, 1889, Everett was an unusually bright and active young man, was he not?

A. I think so; I always considered him so.

Q. He handled himself easily and readily in all respects, did he not?

A. So far as I ever saw.

Q. And in all his movements he was bright and intelligent in every way?

A. I thought so.

(Signed) GROVE H. COWLES.

Subscribed and sworn to before me this 16th day of April, A. D. 1890.

(Signed) EDGAR W. CAMP,
Notary Public, Stutsman County, North Dakota.

ERNEST J. SCHWELENBACH, being duly sworn and called for the plaintiff, says:

Q. What is your name, age, place of residence, and occupation?

A. I am Ernest J. Schwellenbach; my age is 32 years; my place of residence is at Jamestown, North Dakota, and my occupation is station agent at Jamestown of the Northern Pacific Railroad Company.

Q. Are you in charge of the freight business of the defendant at this station?

A. Yes.

Q. Have you in your possession and under your control books, papers of the defendant showing freight received at this station July 6th, 1889, from twelve o'clock noon to twelve o'clock midnight?

A. Yes.

Q. Will you produce the records?

A. I have no records of freight consigned to the railroad company and I have no records of car numbers.

(Signed) E. J. SCHWELLENBACH.

Subscribed and sworn to before me this sixteenth day of April, A. D. 1890.

(Signed) EDGAR W. CAMP,
Notary Public, Stutsman County, N. D.

MATILDA EVERETT, a witness on the part of the plaintiff, recalled:

Direct examination by Mr. GLASPELL:

Q. You have heard the conversation between the juror and the court; you may now state whether your brother's memory is defective as to facts occurring before his injury or not.

67 A. Well, some things he can remember and others he can't.

Q. Can you give us any idea of the distinction; what is it he remembers and what does he fail to remember?

A. Well, before he got hurt he failed to remember a good deal when he was called. I know of a number of things he has forgotten about the crews. He used to know all the crews and now he can't remember them. During his delerium he used to call all the crews and remember them, but now he can't remember them. As far as other things go, I think he remembers well.

JUROR: I would like to know if he remembers things that transpired before better than he remembers things that transpired since?

Mr. GLASPELL:

Q. Does he remember things occurring before his injury better than those occurring after?

A. Yes, sir; he does. Those that have occurred since he only has a slight memory of them sometimes, and if he starts to think them over he gets them mixed up and don't remember them well at all.

The following is the substance of the medical testimony on the part of the plaintiff:

Drs. Kendrick and Fraser testified to having personally examined plaintiff April 19th and 20th, 1890, and found the right side of his face paralysed, his eyes injured, disorganized, and his eyesight seriously impaired. They were of the opinion that such injuries were permanent, incurable, and in the ordinary course of nature it would be probable that the condition of his eyesight would grow worse until the eyesight would be lost. His bodily health was bad, which was probably due to *to* the injury mentioned.

It is agreed by and between counsel that the American — of mortality as an authority in this case is the one published in book form and used by the New York Life Insurance Company of New York.

Mr. WATSON: I desire to offer an objection. I object to the introduction of this table on the ground that the same is irrelevant, immaterial, and incompetent.

68 The foregoing being all the testimony introduced by the plaintiff in this case, at the conclusion thereof the defendant moved the court to instruct the jury to return a verdict for the defendant upon the ground that the evidence introduced by the plaintiff would not warrant a verdict in his favor; which motion the court denied and refused so to instruct the jury; to which ruling of the court the defendant at the time excepted.

And be it further remembered that the defendant introduced evidence in this cause in the following testimony, to wit:

Mr. WATSON: The defendant moves your honors to instruct the jury in this case to return a verdict for the defendant for the reason that no evidence has been introduced by the plaintiff and that the evidence introduced by the plaintiff is insufficient to show that the defendant has been guilty of any acts of negligence upon which it could be liable to the plaintiff in damages in this action.

Motion overruled.

To this ruling of the court the defense is granted an exception.

The following is the substance of the medical testimony on the part of the defense:

Dr. R. G. Du Puy testified that he had treated the plaintiff professionally from about Aug. 1st to Oct. 12th, 1889; that when he ceased to treat him on the day last named he was in a fair way to complete recovery; the inflam-ation in his eyes had disappeared and his sight was perfect. Soon afterwards he saw plaintiff on the street and, noticing that his eyes looked badly, told him not to use them so much, and then offered him, on the part of the defendant, full transportation and the payment of all his expenses during treatment in a hospital at St. Paul, where he could be under the care of a competent occulist, who was the official occulist of the defendant. Plaintiff promised to go, but never did go. Dr. Du Puy said that with proper care and treatment plaintiff would nearly, if not entirely, recover from all injuries sustained by the accident.

FRANK J. WHIDDEN, a witness produced on the part of the defendant, after being duly sworn, testifies as follows:

Direct examination.

Mr. WATSON:

Q. What is your name?

A. Frank J. Whidden.

69 Q. And your age?

A. 29.

Q. Your occupation?

A. Switchman.

Q. How long have you been engaged in that occupation?

A. Eleven years; switching and braking.
Q. And you are in the employ of the defendant?
A. Yes, sir.
Q. And were you in its employ in the month of July last?
A. Yes, sir.
Q. At what place?
A. Jamestown.
Q. In what capacity?
A. Switchman.
Q. Are you acquainted with Mr. Everett, the plaintiff in this action?
A. I am.
Q. Were you acquainted with him last summer?
A. Yes, sir.
Q. Were you engaged with the same switching crew with him last summer?
A. No, sir.
Q. You were on the day crew, were you not?
A. I was.
Q. Did you see the flat car loaded with timbers, and also the box car, in the coupling of which the plaintiff received his injuries?
A. I did.
Q. When did you see them?
A. The next morning.
Q. What were you doing at these cars?
A. I was switching.
Q. Those cars were to be taken out of that 7 track, were they?
A. Yes, sir.
Q. By your switching crew?
A. They were.
Q. Did you find these two cars coupled?
A. No, sir.
Q. They were uncoupled?
A. They were.
Q. Did you couple them?
A. I did.
Q. Did you make the coupling in safety to yourself, without receiving any injury?
70 A. Yes, sir.
Q. State the manner, the position, which you assumed when you went between those cars to make the coupling.
A. I stooped so that my head was below the body of the cars.
Q. You may state whether cars loaded as this flat car was loaded are frequently or unfrequently to be found upon the line of road of this defendant for coupling.
A. Yes, sir.
Q. State whether it is a usual or an unusual thing for a car to be loaded in the manner in which this car was loaded.
A. It is a usual thing for them to be found and received in that way.
Q. State whether a flat car which is properly loaded—I mean

although loaded so that the timbers did not project at the time it was loaded, may during the time that it is being transported over the road get into such a position that the timbers will project over the end?

A. They will.

Q. State how that will be brought about.

A. By handling the train, and setting the air brakes and driving the load ahead.

Q. What effect will that have upon the load?

A. That will naturally slide the load over the ends of the cars.

Q. Naturally slides them forward?

A. Yes, sir.

Q. In the direction in which the train is moving?

A. Yes, sir.

Q. You may state how frequently during the six months preceeding the 6th of July, 1889, you saw cars in the yard at Jamestown with either iron rails, lumber, timber, or other material of that character projecting over the ends of the cars.

A. I couldn't say how frequently; we seen them every day, nearly. If there was cars loaded with lumber or rails, you seen them every day; some of them sticking over more or less.

Q. Suppose, Mr. Whidden, that a switchman in coupling cars loaded with timbers or other material projecting over the end should use a stick in making the coupling, and should make the same in a way that he would place his person between the cars, could the same be coupled without injury?

A. Yes, sir; if a man had a stick long enough to reach the link.

Q. You may state whether such cars can be coupled with safety by stooping below the level of the projecting timbers.

A. Yes, sir.

71 Cross-examination.

Mr. GLASPELL:

Q. You said the coupling could be made with a stick if it was long enough?

A. Yes, sir.

Q. Do you use a stick?

Mr. WATSON: I object.

Objection overruled.

Exception entered.

Mr. GLASPELL:

Q. Did you use a stick in coupling this car?

A. No, sir.

Q. Did you step between the rails to couple this car?

A. I don't know whether I did or not.

Q. Could you couple that car without getting between the rails?

A. Yes, sir.

Q. How?

A. By stooping down and catching hold of the coupling with one hand.

Q. What is the distance from the draw-head to the rail?

A. About two feet.

Q. What is the difference between the rails of the track?

A. About four feet.

Q. How long have you been in the railroad business?

A. About eleven years.

Q. And you testify that the distance between the rails is four feet?

A. Four feet and some inches.

Q. Is it not five feet?

A. I don't know.

Q. You say you stooped in making this coupling?

A. Yes, sir.

Q. Was it necessary to stoop?

A. Yes, sir.

Q. Why?

A. Because if I didn't stoop I would have got my head smashed.

Q. Then there wasn't place enough between the box car and the flat car for you to stand?

A. I didn't try to see.

Q. Did you make the coupling the first time you tried?

A. I did.

Q. What kind of a link was in the draw-head of the flat car?

A. A straight link, I think; I wouldn't be positive.

72 Q. In which car was the pin?

A. The box car.

Q. Did you make the coupling without changing?

A. I did.

Q. You made the coupling, using the link in the draw-head of the flat car?

A. Yes, sir.

Q. Are you sure of that?

A. Yes, sir.

Q. Did you notice any difference in the height of the draw-head in the cars?

A. I think the draw-head was lower in the flat car.

Q. How much lower?

A. I don't know.

Q. Was it enough lower to go under the draw-bar of the other car?

A. They will do that if they are the same height.

A. Well, did this go under the draw-head?

A. I don't know.

Q. Did you set the pin in the box car or did you find it set?

A. I don't know.

Q. How is that?

A. I don't know; I guess I set it myself.

Q. Wouldn't it be necessary to step between the cars to set the pin?

A. Yes, sir; it would.

Q. If one was to rush between the box car and the flat car as they came together to set the pin, it would be necessary to get between the rails, would it not?

A. Yes, sir; unless a man had long enough arms to reach it from the outside.

Q. Would Everett have to get between the rails?

A. He would naturally have to get into the end of the car.

Q. His body would be between the ends of the cars when he went to set it?

A. Yes, sir.

Q. What is the customary way of loading sixteen-foot stuff on a thirty-foot car?

A. I don't know; they load them all ways.

Q. What is the way most frequently used?

A. About one way as much as the other.

Q. Which of the two ways did you see most?

A. It depends upon the quantity of lumber shipped.

Q. Do you find lumber loaded in two lengths as frequently as in one length?

73 A. Well, I couldn't say; I never paid any particular attention. If I saw a car loaded with timber or rails I didn't look to see if they stuck over the end or not, and if they do I generally calculate to get low enough so they won't catch my head.

Redirect examination.

Mr. WATSON:

Q. How long have you been employed in the yards in Jamestown?

A. Three years.

Q. Does your testimony relative to the frequency of the receiving and handling cars with projecting loads apply to your entire service in the yards at Jamestown?

A. Yes, sir.

C. R. WEBBER, a witness produced on the part of the defense, having been first duly sworn, testifies as follows:

Direct examination.

Mr. WATSON:

Q. What is your name?

A. Robert R. Webber.

Q. Your age?

A. Thirty years.

Q. Your residence?

A. Jamestown.

Q. Your occupation?

A. I am employed now as a conductor.

Q. What was your occupation prior to your becoming a conductor?

A. Yard-master at Jamestown.
Q. For the defendant in this action?
A. Yes, sir.
Q. How long have you been in the railroad service?
A. I am going on my eleventh year.
Q. And in what capacity have you been employed most of the time?
A. As a conductor.
Q. How long were you employed as yard-master?
A. Three years.
Q. During that time your principle duties related to the handling and switching cars in the yards at Jamestown, did they?
A. The duties of yard-master is to see that the cars are handled properly and put into the right train for transit, and general supervision of the yard.
Q. You may examine that instrument, Mr. Webber.

Witness shown instrument.

Q. And state what it is.
A. It is a time schedule of the Northern Pacific railroad, of the Dakota division.
74 Q. Does that also contain the rules of the railroad company?
A. Yes, sir—not all of them—with the exception of the rules governing the passenger traffic.

The defendant now offers in evidence this time table of the defendant, including the rules, and asks that the same be marked by the clerk.
So ordered.

Mr. Watson then read to the jury the following rules from his offer in evidence:

Rule 20. All employees are required to exercise the greatest care and watchfulness to prevent injury or damage to persons and property, and in case of doubt take the safe side.
Rule 24. In all cases where instructions are not understood, or where the course to be persued admits of any doubt, the parties in charge shall so act as in no way to compromise the safety or interests of the road, seeking at the first opportunity the necessary explanation from the proper officers.
Caution as to personal safety: Rule 25. Great care must be exercised by all persons when coupling cars. Inasmuch as the coupling apparatus of cars or engines cannot be uniform in style, size, or strength, and is liable to be broken, and as from various causes it is dangerous to expose between the same the hands, arms, or persons of those engaged in coupling, all employees are enjoined before coupling cars or engines to examine so as to know the kind and condition of the draw-heads, draw-bars, and links and coupling apparatus and are prohibited from placing in the train any car with a defective coupling until they have first reported its defect-

ive condition to the yard-master or conductor. Sufficient time is allowed and may be taken by employees in all cases to make the examination required. Coupling by hand is strictly prohibited; use for guiding the link a stick or pin. Each person having to make couplings is required to provide a proper implement for the purpose as above specified. All persons entering into or remaining in the service of the company are warned that the business is hazardous and that in accepting or retaining employment they must assume the ordinary risks attending it. Each employ- is expected and required to look after and be responsible for his own safety, as well as to exercise the utmost caution to avoid injury to his fellows, especially in the switching of cars and in all movements of trains.

75 Stepping upon the front and rear of approaching engines, jumping on or off trains or engines moving at a high rate of speed, getting between cars in motion to uncouple them, and all similar imprudences are dangerous and in violation of duty and are strictly prohibited. Employees are warned that if they commit them it will be at their own peril or risk. Employees of every rank and grade are required to see for themselves before using them that the machinery or tools which they are expected to use are in the proper condition for the service required, and if not, to put them in the proper condition or see that they are so put before using them. All will be held responsible accordingly.

Mr. WATSON:

Q. Are you acquainted with the plaintiff in this action?

A. Yes, sir.

Q. How long have you known him?

A. I have known him, on and off, for the last five years.

Q. Did you have anything to do with his employment in the capacity of switchman for the defendant?

A. I did, sir.

Q. In what capacity, if any, had he been employed by the defendant prior to that time?

A. He was employed by me as a night call-boy prior to that time.

Q. Did he seek employment as a switchman at your hands?

A. Yes.

Q. About what time did he first make the application to you to become switchman?

A. Well, about the first of June, I think he made application to go breaking on the road, and I broached the subject to Chief Dispatcher McCabe, and he said he didn't wish to give him the position on the road for some reason or other—I don't know why. He particularly wanted to go breaking on the Valley passenger train, and I couldn't get him that position, and I told him he better stay where he was until he could get something better. He made his application then to the night yard-master, Mr. Clemens, saying——

By the COURT: No, no, no.

Mr. WATSON:

Q. Just what you said to him.
A. I wish to say this——

By the COURT:

Q. Was he present?
A. No, sir.
Q. Did he tell you he made that application?
76 A. He came to me about the middle of June, and prior to that he made the application to the night yard-master, under whom he was working, directly, for the position of switchman, and this night yard-master came to me and said ——

By the COURT: If you did anything on account of what he said, you can state that.

A. Upon the night yard-master's recommendation I gave him the position of switchman.

Mr. WATSON:

Q. Do you know about the date that he entered upon his duties as switchman?
A. No, sir; not exactly.
Q. What do you know about the plaintiff receiving from you or any one else in the employ of the defendant, on or about the time he went into your employ, a copy of the time table and rules which were introduced in evidence?
A. Yes, sir.
Q. State to the jury what you know about it.
Q. On the issuing of the time card- they are furnished to me by the superintendant and I thereby furnish every man in my employ a copy.
Q. Of which this is a copy in evidence?
A. Yes, sir.
Q. Are the rules contained in the back of that book the same in all time tables issued?
A. Yes, sir; they are; and if there is any change, there is a note in large print giving notice of sich change.
Q. Are the rules the same in all the different issues?
A. Yes, sir; they are the same.
Q. Was your office near the headquarters building in Jamestown the headquarters for Everett while he was call-boy?
A. Yes, sir.
Q. It was from your office that he received his orders to call the different crews, was it?
A. Yes, sir.
Q. You may state whether during all of that time that he was employed as a call-boy a copy of the time table and rules were always in your office subject to his use.
A. There was, sir.

Q. They were always there where he could have and use them if he desired?

A. Yes, sir.

77 Q. Do you know also of his having them when a call-boy?

A. I know, sir, that he has had a time table of the Northern Pacific Railroad Company in his hands frequently.

Q. Have you seen him?

A. Yes, sir.

Q. Did you have any talk with Mr. Everett, subsequent to this accident, in regard to the manner in which he received the same?

A. No, sir; no talk; what he said was given voluntarily.

Q. Where did that occur?

A. That occurred on the street on Fifth avenue, at Jamestown, from Mr. Merrill's barber shop up to Sixth avenue and to my home.

Q. Who was present, if any one, except yourself and him?

A. No one; we were walking along together.

Q. You may state just what was said by him.

A. He was sitting in front of the barber shop and I was going to dinner, and I came along and I said, "Billie, you had better go to dinner," and he said, "Yes, sir," and he got up and we walked along together. One word brought on another and he said to me, "I got down under there to make that coupling with my hand on the box car," and he says, "I saw that I couldn't make the coupling and undertook to get out; I think I raised too quick;" and he said, "When I undertook get out, that is the last thing I remember."

Q. What, if anything, did he say about seeing the timber projecting over the end of the flat car?

A. I don't remember that he said anything in regard to the timber. The natural consequence was——

By the COURT: Hold on.

Mr. WATSON:

Q. What did he say to you about raising up too soon?

A. He said he saw that he couldn't make the coupling and he raised up—that is, that he undertook to get up and he got caught—that is, I could show you how it would be by the corner of the desk.

Q. You may show.

A. In making a coupling of that kind the cars came together that way; the timber would come over about that much. The switchman generally gets hold with the right hand and he puts one foot down that way to make the coupling and gets down under that way, and I understood by his remarks that he got down that way to make the coupling and raised up too quick and got caught right there (indicating head).

Q. After the accident occurred, did you see the timber that struck Mr. Everett's head?

A. I did, sir.

78 Q. You may describe which timber it was on the flat car with respect to its position.

A. When I saw the car it was standing on the side track at the

company's lumber yard. It was the north timber lying on the body of the car—that is, the platform of the car—the very outside timber. The car, you understand, was standing east and west, with the sides north and south. It would be that timber there (indicating), the very outside of the end of it.

Q. Show to the jury upon just what portion of the end of that timber, if you know, you found hair and skin.

A. We will suppose that that was the timber. The timber was 12 by 12 by 16, and it projected over the end of the car that way.

Q. Suppose you lay that upon the desk, won't this represent the box car and this the timber projecting over the flat car in that position?

A. When I examined the timber, right here in the truss-rod bolt in the box car, there was a small gathering of hair and particles of skin supposed to have come from the side of Mr. Everett's head; it was on the very outside timber, on the lower corner, showing evidently that he got hurt by reason of it.

Q. Do you know the height from the level of the ground to the point on the end of the timber where you found that blood and hair?

A. On the height of the car from the rail to the platform it is about four feet four inches.

Q. What is this truss rod that you spoke of?

A. The truss rod is the rod running underneath the car, which acts as a bridge for the car.

Q. Are there more than one of these truss rods on a car?

A. Yes, sir; there are all the way from two to six.

Q. Was the hair and skin which you found on the end of the truss rod of the box car upon the inside or outside of the truss rod?

A. On the outside of the truss rod.

A. The one next the north side of the car?

A. Yes, sir.

Q. What was the height of the end of that truss rod from the ground?

A. That would be about four feet six inches—something like that.

Q. Four feet six inches?

A. Yes, sir.

Q. How far beyond the end of the car did the truss rod extend?

A. Well, I couldn't say positively; not over six inches—probably not that much.

Q. That was fastened by a nut, was it?

79 A. Yes, sir.

Q. Screwed on, was it, in position?

A. Yes, sir.

Q. Aren't you mistaken; is it not only about an inch that the nut comes out at the end—simply room enough for the nut to be screwed on?

A. O, yes; I misunderstood your question; I understood your question was the space between the end of the truss rod and the car.

Q. That was about six inches?

A. About that space. Sometimes four or six.

(By Mr. GLASPELL:)

Q. That was from the north side of the car it was from four to six inches?

A. Yes, sir. Suppose this was the end of the side of the car, the truss head would be right there (indicating).

Mr. WATSON:

Q. You may state, Mr. Webber, if you know, what the distance is between the ends of two cars which are coupled.

A. The distance between two cars which are coupled, with the slack taken out, close together, is on an average of about two feet six and a half to seven inches.

Q. That would be thirty to thirty-one inches and a half?

A. Yes, sir.

Cross-examination.

Mr. GLASPELL:

Q. Do the cars vary in that matter?

A. Not materially so; not a standard car. The Northern Pacific railroad stock is all standard.

Q. Are they sometimes out of order?

A. O, yes.

Q. You found hair on the end, you say?

A. Yes, sir.

Q. And also on the stick?

A. Yes, sir.

Q. Well, you say that the space between these two cars when they came together and when Everett made the attempt to make the coupling was thirty inches?

A. I would say that they are about that distance.

Q. How far did the lumber project?

80 A. The lumber projected over about twenty inches.

Q. That would leave space for Everett's head of about ten inches?

A. Yes, sir; about.

Q. How do you understand, then, that there was hair and blood on the stick?

A. I understand from the nature of the accident that the draw-bar slipped by.

Q. How did that happen in this particular case?

A. It often happens on draw-bars that are in perfect shape. It happens from the peculiar position that the — are in the draw-bars, and sometimes it passes the draw-bars, and sometimes it passes the other draw-bar, whereby it passes the other draw-bar.

Q. That might happen where there is a variation in the height of the draw-bar?

A. Yes, sir; and a draw-bar has also a blow sideways one or two inches, and to make a coupling the switchman has got to set the draw-bar with his hands.

Q. Will you make that coupling as you did before?

Desiring witness to illustrate it.

A. Yes, sir.

Q. How would you set that pin in the draw-head and at the same time make the coupling?

A. I wouldn't do it.

Q. Why not?

A. I would set the pin before the car reached me.

Q. Suppose they were coming rapidly and you had time to set the pin, and at the same time turn around and pin, would
81 that be the natural way of doing the business?

A. Hardly; not when I saw those timbers.

Q. We haven't said anything about the timbers; assuming that you hadn't seen the timbers.

A. If it was a common flat car it would be my duty to find out what the car was loaded with.

Q. Show the jury how you would attempt to make a coupling of a flat car and a box car, not knowing that timber projected over the end.

A. I would step in with one hand that way.

Q. When you set the pin?

A. Yes, sir.

Q. With your left hand?

A. Not always.

Q. How would you do it in this case?

A. I would know that the timbers projected.

Q. Leave that out of this case.

A. I do know it.

Q. You refuse to assume that the timbers were not seen?

By the COURT:

Q. Suppose that that car had no lumber on it?

A. I should have made the coupling in the ordinary way.

Q. Show how.

A. Just get in there and set the pin and drop it in. I would watch the car and gauge the speed it is running at, and you run in and set the pin in that fashion (indicating), and you stand out this way and gauge your link and your link enters the draw-bar, and the natural momentum that this car strikes the other one drops the pin in in that fashion (indicating), and if it don't drop you put this hand up and drop it down.

Mr. GLASPELL:

Q. Then it would be necessary to get in between the rails to make that kind of a coupling?

A. No, sir.

Q. In what case would it be necessary?

A. It would be the option of the switchman to do it, if he could, without.

Q. You had charge of all the switchman in Jamestown?

A. Yes, sir.

Q. In 1889?
A. Yes, sir.
82 Q. What is the gauge of that track?
A. Four feet eight inches.

By the COURT:

Q. That is the width of a car?
A. About six feet.
Q. Did you ever measure it?
A. No, sir.
Q. Three feet ten inches if you would measure one. Do you mean to say that you could get between the cars without getting between the rails?
A. I think he could.
Q. Between the cars on the side?
A. No, sir; you would naturally suppose the arm was a part of the body.

Mr. GLASPELL:

Q. In coupling with a stick was it necessary to get in between the cars?
A. Yes, sir; you have to get your arm in there.
Q. Did the men in 1889 use sticks in coupling?

Mr. WATSON: Objected to.
By the COURT: That is not cross-examination, and that is enough of that. You needn't ask anything about it.

Q. Where is your office; where was your office as yard-master?
A. It was at the small building west of the general headquarters.
Q. In the city of Jamestown?
A. Yes, sir.
Q. How far was that from the yards?
A. Well, there is yards on both sides of the office.
Q. Well, the main yards, where the switching was done mostly?
A. Probably fifteen hundred feet to two thousand feet.
Q. You saw that car the next morning?
A. Yes, sir.
Q. At what place?
A. Jamestown.
Q. At the company's lumber yard, you said?
A. Yes, sir.
Q. What was being done with it there?
A. Standing on the side track.
Q. Was it being unloaded?
A. No, sir.
83 Q. To whom did the freight belong?
A. To the Northern Pacific Railroad Company.
Q. What kind of timber was it?
A. I suppose it was timber to be used for bridge purposes.
Q. Do you know the length of it?
A. Twelve by twelve by sixteen.

Q. Sixteen feet long?
A. Yes, sir.

Mr. WATSON:

Q. Could the flat car in question, with the timbers projecting over the end, as you found they were projecting, have been coupled to a box car in entire safety to the person making the coupling by the use of a proper stick?
A. They could, sir.
Q. Could such a coupling have been made without the peerson making the same placing anything more than his arm between the cars—any more of his body, I mean, than simply his arms between the two cars;
A. No, sir; he would have to get down with his body underneath the car.

JUROR:

Q. Was the pin in the box car when this coupling was made?
A. I didn't say it was; I don't know anything about that.
Q. How would you make a coupling when there was no pin in the box car?
A. I was just simply supposing there was one in there.
Q. I would like to know how it could be done when there was no pin in there and when you had the pin in your hand?
A. If I had the pin in my hand I should certainly put it in the draw-head of the box car. Then I wouldn't have any business in there coupling, if I didn't have the proper tools to make it with.

Another JUROR:

Q. Are the widths of these cars the same, the flat cars and the box cars?
A. There is a slight difference in favor of the——
Q. In favor of the box car?
A. Yes, sir.
Q. How much difference?
A. The box car has an outside covering, an- the difference, I suppose, is in the siding.
Q. Probably an inch?
A. Probably an inch or an inch and a half.
84 Q. How would you account, then, for the hair on the outer edge of the timbers on the one side and on the end of the draw-head six inches from the outside of the other car?
A. I didn't say exactly six inches. You understand that the nature of the accident shows that the draw-head—that the bolt of the truss rod—hit Mr. Everett in the ear, and that is what ruptured the ear and broke the drum of the ear, and there was a little hair on the end, and skin, and as if he should have his head turned slightly forward. I helped carry the young man from the baggage-room to the office, and attended him, more or less, during his sickness, and took a good deal of interest in it, and provided men to set up with him during the sickness. Across this side it was ruptured,

and right across here it was simply marked. The roughness of some timbers had scraped the hair off, and this side wasn't hurt a particle; it was right across here.

By the COURT:

Q. Mr. Conductor, look at that diagram and see if it correctly represents the end of a box car.
A. Yes, sir.
Q. What is that?
A. That would represent the deadwood of the draw-box.
Q. Its length is two and a half feet?
A. Just about that.
Q. Its thickness is about what?
A. Seven and a half inches.
Q. The play of the spring is how much between the deadwood and th- draw-head?
A. And inch to an inch and a half.
Q. Some draw-heads are constructed differently. What is the length of the draw-head?
A. I should think about eight to ten inches.
Q. Now, do you know the width of a box car?
A. I couldn't say positively; I am ashamed to say it, exactly.
Q. You go down and measure one and come back and tell us.

—— WITHNELL, a witness produced on the part of the defense, having been first duly sworn, testifies as follows:

Q. What is your name?
A. —— Withnell.
Q. Your age?
A. Thirty-one.
Q. And your occupation?
85 A. Foreman of the lumber yard at Jamestown of the Northern Pacific railroad.
Q. How long have you been in that situation?
A. Four years.
Q. Is that yard the place where defendant receives and stores timber for use in its various departments?
A. Yes, sir.
Q. You may state whether your duties pertain to the unloading of such lumber when it is received at the yards at Jamestown.
A. Yes, sir.
Q. Have you during the time you have had charge of that lumber yard observed the manner in which cars loaded with such lumber and timbers are loaded?
A. Yes, sir.
Q. Did you see the car—the flat car loaded with timbers from which the plaintiff in this action received his injuries?
A. Yes sir; it was unloaded in my yard.
Q. State *what* that car was loaded, in a usual or unusual manner.
A. In the usual manner.

Q. State to the jury what proportion—as nearly as you can—what proportion of all the cars which are received by you at that lumber yard loaded with timbers or lumber for the company are loaded in the manner in which that car was loaded.

A. We usually load two sixteen-foot lengths on a thirty-foot car; some sixteen and fourteen foot come together, and sometimes they slide ahead and project over the car.

Q. Has it been a usual thing in your observation for cars to come into your yard with the ends of the timbers projecting as much as twenty or twenty-two inches over the end?

A. I have never measured them, but I think it is about eighteen inches many times.

Q. And you have been four years in that yard?

A. Yes.

Mr. GLASPELL:

Q. You say it is customary to load two sixteen-foot lengths on a thirty-foot car?

A. Yes, sir.

Q. About how high would such loads be?

A. About three feet high.

Q. Did you ever receive and cars with sixteen-foot stuff in one layer?

A. Yes, sir.

Q. This lumber belonged to the railroad company?

86 A. Yes, sir.

Q. Do you know where it came from?

A. No, sir. My duty is just to unload it and take it off and see that it is right.

FRANK CLEMENS, a witness produced on the part of the plaintiff, having been first duly sworn, testifies as follows:

Direct examination.

Mr. WATSON:

Q. What is your name?

A. F. A. Clemens.

Q. Your age?

A. Thirty-seven.

Q. Your residence?

A. Jamestown, Dakota.

Q. And your occupation?

A. Yard-master at Jamestown.

Q. For the defendant in this action?

A. Yes; the Northern Pacific railroad.

Q. How long have you served in that capacity?

A. A year and a half.

Q. How long have you been engaged in work in and about railroad yards?

A. Going on twelve years.

Q. Your experience during that time related to the handling and switching of cars?

A. Altogether to switching, with the exception of one month on the road.

Q. Are you acquainted with the plaintiff in this action?

A. I am.

Q. How long have you known him?

A. Ever since I have been in Jamestown, going on about eight years.

Q. You knew him during the time he acted as call-boy for the defendant?

A. Yes, sir; he worked under me.

Q. He was under your immediate charge and supervision?

A. Yes, sir.

Q. About what time did you begin switching?

A. Along in June some time—the latter part of June; I don't just remember the date.

Mr. WATSON: If it please the court, I am in some doubt, in view of the suggestions of the court yesterday in view of this man's inexperience, whether I ought to introduce any evidence to
87 show whether he had been in the habit of voluntarily offering to make couplings while he was a call-boy.

By the COURT: You may show that he was familiar with the business conducted there.

Mr. WATSON:

Q. State what you know about the plaintiff volunteering to do the work of a switchman prior to his employment in that capacity.

A. He volunteered at different times to make coupling- for switchmen, from my own personal observation in the yard.

Mr. GLASPELL:

Q. That was while he was call-boy?

A. While he was call-boy.

Mr. WATSON:

Q. Did you know about his entering to make the coupling on the Valley train?

A. I did; I stood right there.

Q. He volunteered to do that without being called to?

A. Yes, sir; the foreman was on the other end of the foot-board opposite to him.

Q. Did you speak to him after he failed to make the coupling?

A. I did.

Q. What did you tell him?

A. He went into the coach immediately after he attempted to make the coupling, and I told him he better not attempt to make the coupling of that kind of a draw-head. The coach draw-heads are different; the mouth is right in the end of the draw-head, and there is another that takes in just half of the draw-head—just a

slot—they are more dangerous than the other, and in making that kind of a coupling with a ling and pin we, as a general thing, put the link in the draw-head and then enter the other end in the bull-head of the engine.

Q. And he made other attempts to make couplings while he was call-boy?

A. Yes, sir.

Q. About what time did he apply to you for a position as switchman?

A. I should say along in the middle of June some time.

Q. 1889?

A. Yes, sir.

Q. And he was employed along the latter part of that month?

A. Yes, sir.

Q. What conversation, if any, did you have with him upon his employment regarding the nature and character of his work?

88 A. He told me that he would like to go on the road and preferred a job on the Valley passenger, braking, and Mr. McCabe, the chief train-dispatcher, objected to his going on the road; and the young man told me that he wasn't making enough calling, and he wanted a job that he could make more at, and he asked me then for a job switching in the yard, and asked me if I thought Webber would give him one, and he said he would be satisfied to take such a job; and I then told him of the danger of switching, and told him that I would see Webber, and I spoke to Mr. Webber and told him that I would recommend the young man, and that he would make a good switchman; and he said that as soon as I could get another man to fill the position of call-boy he would give him a job; and I told him of the danger before he took the position, and I told him to always look and see if anything projected over, and warned him in particular about flat cars of rails and air brakes. A few of our flat cars have air brakes and the generality of them haven't, and they are always put ahead, and a flat car of rails when they don't extend over before they get to the end of their destination the stopping by the air brake slides them over.

Q. And you warned him of the danger of making couplings on such cars?

A. I did, and told him always to look, and in case they projected over to get down underneath.

Q. Did you have occasion to talk with him at any other time or times subsequent to his employment as switchman and prior to his accident regarding the dangers of his employment?

A. I talked to him at different times. I had occasion once after his employment as switchman—I spoke to him once in particular about the dangers.

Q. Had he done some act upon which you found occasion to talk to him?

A. He had; he went in to make a coupling between two cars on track # 7, between two switches where there is guard rails, and stepped in with both feet and walked along and attempted to make a coupling and failed, and walked along a few steps before he suc-

ceeded, and I stood there and watched him and thought it best not to speak to him while he was in there, and the foreman of the crew stood there also, and after he got out I called him over and told him he had done a very foolish trick there, stepping in with both feet, especially in that place, and told him under no consideration ever to do it again, and he looked somewhat sober for a minute or two and said, "I am all right; I won't get hurt," and turned
89 around and went about his work.

Q. You may state whether prior to his employment as switchman he was a bright, active, intelligent young man.

A. I considered him unusually so.

Q. Was he quick and ready in his movements, or otherwise?

A. He was quick and ready, and that is one reason I recommended him as a switchman to Webber.

Q. State what his qualifications were to successfully fill the position of a switchman as compared with men who ordinarily are in that employment?

A. Of course, he didn't have the experience an old switchman would have, but I considered him far from being a green man at the business, and that he had had experience enough around the yard there so that he could fill the position and learn the business gradually.

Cross-examination.

Mr. GLASPELL:

Q. You thought he had learned the business gradually?

A. Yes, sir.

Q. You didn't think he had learned it thoroughly at the time, did you?

A. No, sir; I didn't think he had. That is a business that a man can learn something about every day.

Q. You used to speak to him prior to his commencing work, about the dangers of switching?

A. I did.

Q. Do you recollect where this occurred?

A. Once at the yard-master's office, at the outside, on the east end.

Q. Who was present besides yourself and the defendant?

A. Nobody.

Q. Was that the only time that you spoke to him before he went to work?

A. No, sir.

Q. You spoke to him again?

A. I did.

Q. When?

A. I don't recollect the different times, but I spoke to him once in the yard-master's office.

Q. Was that before he went to work?

A. No, sir; after.

Q. How soon did he go to work after you spoke to him?

A. I think he made application for the job of switching along

about the middle of June, and I told him then of the dangers there was in switching, and also told him, as I took unusual interest in him—and told him that I wouldn't want to see him hurt.

90 Mr. WATSON: If it please the court, I find that the time card which I have introduced in evidence was the one that went into effect August 25th. It is in testimony that the rules which are in the back of the book are the same in all the time cards, and I have telegraphed to Jamestown and received a copy of the ones in force at the time of this accident.

Mr. GLASPELL: I will concede that this copy of the time table and rules are the same which were in effect on the 6th of July, 1889.

Received and marked "#2."

Mr. WATSON:

Q. Do you know of the plaintiff having received a copy of these rules at or about the time that he was employed as a switchman?

A. I have an indistinct remembrance of having given him a time card, and I couldn't say positively that I did.

Q. Was the copy of the time card and rules always kept in this office where his headquarters were?

A. Yes, sir; during Mr. Webber's administration there was a new time card made out and we got enough of them to go around and put the names of the men on them, and they were left on my desk, and I distributed them to the boys as they came in.

Q. Are you acquainted with the condition of the track and the grounds in the yards at Jamestown where these cars were attempted to be coupled by the plaintiff?

A. I am; yes, sir.

Q. State whether the ground at that point is level or otherwise.

A. Well, I should call it on a level.

Q. State whether you measured the distance from the level of the ground at that point to the point upon the end of the projecting timber where the hair and blood were seen.

Q. What, from the ground to the timber where the blood was?

Q. Yes.

A. I didn't measure from the ground, but I should say about four feet six inches from the top of the ties, and the top of the ties is on a level with the ground there.

Q. Did you see the blood and skin on the end of the timber?

A. I did.

Q. Did you see it anywhere else?

A. I did.

Q. Where?

A. On the box-car bolt—draw-head bolt.

Q. Which one?

A. On the north side of the car, the north draw-head, and the east end of the car.

91 Q. You may state what the height of that draw-head would be from the level of the ground.

A. Three feet ten inches.

Q. About three feet ten inches?
A. Yes, sir.

Mr. GLASPELL:

Q. Did I understand you to say that the timber was four feet and something?
A. I should judge it was four feet six inches, about, from the top of the ties.
Q. And the draw-head was three feet eight inches?
A. Yes, sir.
Q. Is that right, Mr. Clemens?
A. About right.
Q. And you saw hair and skin on the bolt and also on the timber?
A. Yes, sir.
Q. How do you account for that difference in height?
A. I say about four feet six inches—I didn't measure it; I didn't measure it, I am only supposing; but from the top of the ties to the top of the flat car is about four feet four inches.

J. A. SANFORD, a witness produced on the part of the defense, having been duly sworn, testifies as follows:

Direct examination.

Mr. WATSON:

Q. What is your name?
A. J. A. Sanford.
Q. Your age?
A. Twenty-seven.
Q. Residence?
A. Jamestown, North Dakota.
Q. Occupation?
A. Night car-clerk.
Q. For whom?
A. The Northern Pacific railroad.
Q. Were you employed in that capacity all the summer of 1889?
A. I was.
Q. Are you acquainted with the plaintiff in this action?
A. I was.
Q. Did you know him at that time?
A. I did.
Q. Is your office in the same room with Mr. Webber?
A. Yes, sir.

Witness shown instrument.

92 Q. You may state what that instrument is.
A. The time schedule of the Northern Pacific Railroad Company, Dakota division.
Q. Is that the one containing the rules which were in force on the sixth of July, 1889?
A. It is.

Q. State whether, to your knowledge, a copy of that time table and rules were delivered to the plaintiff at or about the time he became a switchman.

A. There was.

Q. In your presence?

A. Yes, sir.

Q. By whom?

A. I couldn't say positive whether it was by the night yard-master or the—I am not positive.

Defense rests.

Plaintiff on Rebuttal.

MATILDA EVERETT recalled.

Direct examination.

Mr. GLASPELL:

Q. Did you hear Dr. Du Puy's testimony this morning?

A. I did.

Q. Did you overhear a conversation between Dr. Du Puy and your brother about going to St. Paul?

A. I did.

Q. Relate it.

A. We were at home, my brother and myself, and my mother wasn't in the room at the time, but came in before the conversation ended. He said that the boy's eyes had gone so far that he had better go to St. Paul and see a doctor; and we were afraid to have him go because of his mind being in such a condition, and Dr. Du Puy insisted on his going, and I never heard anything about his expenses being paid.

Q. Do you know of your brother being treated in Jamestown by Dr. Archibald?

A. Yes, sir.

Q. At what time?

A. I think he was treating him a little while before Dr. Du Puy gave up treating him; he was treated in August by Dr. Archibald.

Q. And how long did that continue?

A. I think over a month.

Q. When did your brother's eyes first assume the flushed
93 condition in which they now appear?

A. I don't know when they began to get worse, but I think it was after August; I never knew them to be in any other condition since he got out of bed, and they began to protrude.

By the COURT: You have gone over that ground, or should have gone over it, in your examination-in-chief.

Mr. GLASPELL: That is all.

Mr. WATSON: No cross-examination.

WILLIAM J. EVERETT, the plaintiff, recalled.

Direct examination.

Mr. GLASPELL:

Q. Did you hear Dr. Du Puy's testimony in relation to your going to St. Paul?
A. I did.
Q. What did he say to you about going to St. Paul?
A. He said that will be the only place to get your eyes fixed, and that——
Q. What else did he say?
A. He said, "If that don't suit you, you had better go to Brainerd."
Q. What did he say about your expenses?
A. He said nothing about it; only offered me a pass.
Q. Did he offer you a pass?
A. Yes, sir.
Q. To what place?
A. To Brainerd or St. Paul.
Q. Were you at that time under the treatment of any other doctor?
A. Dr. Archibald.
Q. Who is Dr. Archibald?
A. The Jamestown occulist.

Mr. WATSON: No cross-examination.

Plaintiff rests, upon rebuttal.

Examined and found correct.
(Signed) S. L. GLASPELL,
Pl'ff's Att'y.

94 This being all the testimony introduced by the defendant and, in connection with the testimony introduced by the plaintiff, all the testimony introduced in this cause, thereupon the defendant moved the court to instruct the jury to return a verdict for the defendant upon the ground that the evidence in the cause would not warrant a verdict for the plaintiff; which motion the court denied and refused to instruct the jury as moved by the defendant; to which ruling of the court the defendant at the time excepted.

And be it further remembered that at the close of the argument in this cause and when the court was proceeding to charge the jury the defendant asked the court to submit to the jury and require them to return answers to the following questions, to wit.

Which motion and request of the defendant the court denied and refused to submit said questions or any of them to the jury to be answered; to which ruling of the court the defendant at the time excepted.

And be it further remembered that the court, among other things, charged the jury as follows:

"The fact that the plaintiff was injured in an effort to couple defendant's cars at the time and place mentioned has not on the trial been contested, but the defendant says the plaintiff's injury was the result of his own negligence, or that his own negligence contributed to his injury; and if this answer of the defendant is true, it is a complete defense to this action.

"To entitle the plaintiff to a verdict he must satisfy you by a preponderance of the evidence of these two principal facts: First, that his injury was the result of the negligence of the railroad company, and, second, that his own neglect was not the occasion of the injury and did not in any manner contribute to it. If the plaintiff's injury resulted from his own negligence, or if his own negligence contributed to his injury, he cannot recover.

"The particular act which the plaintiff alleges constitutes the neglect on the part of the defendant which resulted in his injury is that the flat car, which was in motion and which he was ordered to couple to a box car standing on the track, was loaded with lumber which projected twenty-two inches, or about that distance, over the end of the car where the coupling was to be made.

"The first question for you to determine is, Was this an unusual or improper or negligent manner of loading lumber on a flat car? If you answer this question in the negative, you need inquire no further, but will return a verdict for the defendant.

95 "If you answer this question in the affirmative, you will then inquire whether such negligent loading of the lumber on the car was the cause of the plaintiff's injury, unmixed with any negligence on his part; and if you find that it was, your verdict will be for the plaintiff.

"The plaintiff was bound to exercise care and diligence in his employment of coupling cars; he was bound to use all his senses as actively and intelligently as any prudent man having a knowledge of the hazardous character of his business would have done under like circumstances. The business is a dangerous one and imposed on him the duty of exercising great care and caution.

"If the plaintiff saw that the lumber projected over the end of the car before he attempted the coupling, or if he could have seen it if he had exercised great care and diligence, which, under the circumstances, it was incumbent upon him to exercise, then he can claim nothing on account of the injury resulting from such projecting lumber, and the injury must be attributed to his own negligence.

"If you find the lumber was negligently loaded—that is, in an unusual and dangerous manner, and that this fact was unknown to the plaintiff, then when the plaintiff was ordered to couple the cars he had a right to assume that the car was properly loaded and act on that assumption; but if before the peril was encountered he discovered the projecting lumber, he should have desisted from any effort to make the coupling, or should have made it in some manner that would not have subjected him to injury, if it was practical for him to do so; and if by the exercise of proper diligence he might

have discovered the projecting lumber before the accident and in time to avoid it, he cannot recover."

To the following passage of the foregoing instruction, namely, "If you find the lumber was negligently loaded—that is, in an unusual or dangerous manner—and that this fact was unknown to the plaintiff, then when the plaintiff was ordered to couple the cars he had a right to assume that the car was properly loaded, and acted on that assumption; but if before the peril was encountered he discovered the projecting lumber, he should have desisted from any effort to make the coupling, or should have made it in some manner that would not have subjected him to injury, if it was practical for him to do so; and if by the exercise of proper diligence he might have discovered the projecting lumber before the accident and in time to avoid it, he cannot recover," the defendant at the time said
96 instruction was given to the jury objected, and asked that the same be withdrawn; which objection and motion was overruled, and said charge, including the paragraphs last above quoted, which was excepted to, was given to the jury as a part of the charge of the court; to which ruling the defendant at the time excepted.

All of which said several exceptions of the defendant are now here signed, sealed by the judge, and made a part of the record in this case.

HENRY C. CALDWELL,
United States Circuit Judge, Eighth Circuit. [SEAL.]

Upon the back of said bill of exceptions appear endorsements in words and figures following, to wit:

"In U. S. circuit court, district of North Dakota. Wm. J. Everett *vs.* Northern Pacific R. R. Bill of exceptions. Filed April 26th, 1890. J. A. Montgomery, clerk."

Thereupon, afterwards, to wit, on the 10th day of May, the stipulations for costs was filed in said case; which said stipulation is in words and figures following, to wit:

In the United States Circuit Court, District of North Dakota.

WILLIAM J. EVERETT, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

It is hereby stipulated that the plaintiff's costs herein are $75.00 and may be so taxed in the judgment herein.

S. L. GLASPELL,
Att'y for Plaintiff.
JNO. S. WATSON.
Att'y for Defendant.

4–22. $7,000.00.

Costs taxed and allowed at $75.00, pursuant to the above stipulation, this 10th day of May, 1890.

J. A. MONTGOMERY, *Clerk.*

Upon the back of said stipulation appear endorsements in words and figures following, to wit:

U. S. circuit court, district of North Dakota. Wm. J. 97 Everett *vs.* N. P. R. R. Co. Stipulation for costs. Filed May 10, 1890. J. A. Montgomery, clerk.

Thereupon, afterwards, to wit, on the 22nd day of May, 1890, an assignment of judgment was filed in said case; which assignment is in words and figures following, to wit:

Assignment of Judgment.

Know all men by these presents that I, William Everett, of Jamestown, county of Stutsman and State of North Dakota, party of the first part, do hereby sell and assign to S. L. Glaspell, of Jamestown, part- of the second part, the certain judgment of the circuit court of the United States, district of North Dakota, rendered at the April, 1890, term, at Bismarck, to wit, on the 22nd day of April, 1890, in favor of William J. Everett and against the Northern Pacific Railroad Company, for the sum of seven thousand dollars and costs, and I hereby authorize the said party of the second part to take any steps necessary to collect said judgment, for value received.

Witness my hand and seal this 21st day of May, A. D. 1890.

(Signed) WILLIAM EVERETT.

STATE OF NORTH DAKOTA, } *ss.*
County of Stutsman, }

On this 21st day of May, A. D. 1890, before me, William S. Trimble, a notary public in and for said county, personally appeared William J. Everett, personally known to me to be the identic*le* person who signed the foregoing assignment, and he acknowledged to me that he signed the same freely and voluntarily and for the purposes therein mentioned.

Witness my hand and seal the day above written.

(Signed) WILLIAM B. TRIMBL-. [SEAL.]

Upon the back of said assignment of judgment appear endorsemen-s in words and figures following, to wit:

In U. S. circuit court, district of North Dakota. Wm. J. Everett *vs.* N. P. R. R. Co. Assignment of judgment. Filed May 22, 1890. J. A. Montgomery, by Edw'd S. Allen, deputy clerk.

Thereupon, afterwards, to wit, on the 20 day of June, 1890, a writ of error was allowed in said case and a citation issued thereon; of which said writ of error and citation and assignment of errors the following are the originals:

98 In the Supreme Court of the United States, October Term, A. D. 1890.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
WILLIAM J. EVERETT, Defendant in Error.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, D. C., comes the said Northern Pacific Railroad Company, by Jno. C. Bullitt, Jr., and Jno. S. Watson, its attorneys, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

First. The court erred in refusing to grant the motion, made at the close of plaintiff's testimony, to instruct the jury to return a verdict for defendant on the ground that the evidence introduced by the plaintiff would not warrant a verdict in his favor.

Second. The court erred in refusing to grant the motion, made after all the testimony had been submitted, to instruct the jury to return their verdict in favor of the defendant, upon the ground that the evidence in the case would not warrant a verdict for the plaintiff.

Third. The court erred in instructing the jury as follows: "If you find the lumber was negligently loaded—that is, in an unusual manner—and that this fact was unknown to the plaintiff, then when the plaintiff was ordered to couple the cars he had a right to
99 assume that the car was properly loaded and act on that assumption; but if before the peril was encountered he discovered the projecting lumber, he should have desisted from any effort to make the coupling or should have made it in some manner that would not have subjected him to injury, if it was practical for him to do so, and if by the exercise of proper diligence he might have discovered the projecting lumber before the accident and in time to avoid it, he cannot recover."

Fourth. The court erred in denying and overruling the motion made by plaintiff in error for a new trial.

Fifth. The court erred in rendering judgment against the plaintiff in error.

And the said Northern Pacific Railroad Company, plaintiff in error, prays that the judgment aforesaid may be reversed and annulled, and that it may be restored to all things which it hath lost by occasion of the said judgment.

JNO. C. BULLITT, JR.,
JNO. S. WATSON,
Attorneys for Plaintiff in Error.

[Endorsed:] Filed June 20, 1890. J. A. Montgomery, clerk, by Edw'd S. Allen, deputy.

100 The United States of America to William J. Everett, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, anno Domini eighteen hundred and ninety, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of North Dakota, wherein The Northern Pacific Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States Supreme Court, this 18th day of June, in the year of our Lord one thousand eight hundred and ninety.

ALFRED D. THOMAS,
District Judge.

[Endorsed:] U. S. circuit court, district of North Dakota. Wm. J. Everett *vs.* N. P. R. R. Co. Citation. Filed June 20, 1890. J. A. Montgomery, clerk, by Edw'd S. Allen, deputy.

101 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of North Dakota, greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between William J. Everett, plaintiff, and Northern Pacific Railroad Company, defendant, a manifest error hath appeared, to the great damage of the defendant, Northern Pacific Railroad Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 18th day of June, A. D. 1890.

[Seal Circuit Court of the United States, District of North Dakota.]

J. A. MONTGOMERY,
Clerk of the Circuit Court of the United States for the District of North Dakota,
By EDW'D S. ALLEN, *Deputy.*

[Endorsed:] U. S. circuit court, district of North Dakota. Wm. J. Everett *vs.* N. P. R. R. Co. Writ of error. Filed June 20, 1890. J. A. Montgomery, clerk.

102 Thereupon, afterwards, to wit, on the 20th day of June, 1890, a supersed*ias* bond was filed in said case; which supersed*ias* bond is in words and figures following, to wit:

In the United States Circuit Court, District of North Dakota.

NORTHERN PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
WILLIAM J. EVERETT, Defendant in Error.

Know all men by these presents that we, Northern Pacific Railroad Company, a corporation under the laws of the United States, as principal, and E. P. Wells and C. P. Smith, as sureties, are held and firmly bound unto William J. Everett, his certain attorney, executors, administrators, or assigns, in the full and just sum of ten thousand dollars ($10,000.00), to be paid to the said William J. Everett, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this May 26th, 1890.

Whereas lately, at a session of the circuit court of the United States for the district of North Dakota, in a suit depending in said court between said William J. Everett, as plaintiff, and the said Northern Pacific Railroad Company, as defendant, a final judgment was, on the twenty-second day of April, A. D. 1890, rendered in favor of the said William J. Everett and against the said Northern Pacific Railroad Company for the sum of seven thousand and seventy-five dollars ($7,075), and the said Northern Pacific Railroad Company having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit and a citation directed to the said William J. Everett, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Northern Pacific Railroad Company shall prosecute said writ of error to effect and answer all damages and costs *is* said Northern Pacific Railroad Company fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

103 In witness whereof the said Northern Pacific Railroad Company has caused these presents to be executed by its vice-president and attested by its assistant secretary and its corporate seal to be affixed hereto, and the said E. P. Wells and C. P.

Smith have duly affixed their names and seals hereto on the day and year first above written.

THE NORTHERN PACIFIC RAILROAD COMPANY,
By JAMES P. WILLIAMS, *Vice-Pres't.*
[SEAL.] Attest: GEORGE H. EARL, *Assistant Secretary.*
E. P. WELLS.
C. P. SMITH.

STATE OF NORTH DAKOTA, }
County of Stutsman. }

E. P. Wells and C. P. Smith, being duly and severally sworn, each for himself says that he is one of the parties who executed the foregoing bond; that he is worth the full sum of ten thousand dollars over and above all of his debts and liabilities and exclusive of all property by law exempt from levy and sale upon execution.

E. P. WELLS.
C. P. SMITH.

Subscribed and sworn to before me this June 5th, 1890.

GEORGE WYLIE,
[SEAL.] *Notary Public.*

Upon the back of said bond appear endorsements in words and figures following, to wit:

U. S. circuit court, district of North Dakota. Wm. J. Everett *vs.* N. P. R. R. Co. Supersidias bond. Filed June 20, 1890. J. A. Montgomery, clerk, by Edward S. Allen, deputy. The within bond and sureties are hereby approved. Alfred D. Thomas, judge U. S. D. C., dist. of No. Dak.

Thereupon, afterwards, to wit, on the 19th day of July, 1890, an affidavit of service of citation, etc., was filed in this case; which said affidavit is in words and figures following, to wit:

In the United States Circuit Court, District of North Dakota.

WILLIAM J. EVERETT, Plaintiff, }
vs. }
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant. }

104 STATE OF NORTH DAKOTA, }
Stutsman County. }

John S. Watson, being duly sworn, on oath says that at Jamestown, in the county and State aforesaid, on the twenty-fifth day of June, A. D. 1890, he served the annexed and foregoing writ of error, undertaking, and citation herein upon Samuel L. Glaspell, attorney for plaintiff, William J. Everett, by delivering to and leaving with said Samuel L. Glaspell true and correct copies of each of said papers.

JOHN S. WATSON.

Subscribed and sworn to before me this July 18th, 1890.

WILLIAM B. S. TRIMBL–,
Notary Public.

[SEAL.]

Upon the back of said affidavit of service of citation, etc., appear endorsements in words and figures following, to wit:

U. S. circuit court, district of North Dakota. Wm. J. Everett *vs.* N. P. R. R. Co. Affidavit of service of citation, etc. Filed July 19, 1890. J. A. Montgomery, clerk, by Edward S. Allen, deputy.

105 UNITED STATES OF AMERICA, } *ss:*
District of North Dakota, }

By virtue of the foregoing writ of error and in obedience thereto I, J. A. Montgomery, clerk of the circuit court of the United States for the district of North Dakota, in the eighth circuit, do hereby certify that the foregoing pages, from one to one hundred and four, contain true and faithful transcripts of the pleadings and proceedings of record and on file in my office as said clerk, to this date, in the case of Wm. J. Everett *vs.* The Northern Pacific Railroad Company, and that a copy of the writ of error has been lodged and remains in my said office.

Witness my hand and the seal of said court, at Fargo, this 26th day of August, 1890.

[Seal Circuit Court of the United States, District of North Dakota.]

J. A. MONTGOMERY, *Clerk.*

Endorsed on cover: Case No. 14,157. N. Dakota C. C. U. S. No. 188. The Northern Pacific Railroad Company, plaintiff in error, *vs.* Jane Everett, administratrix of William J. Everett, deceased. Filed September 18, 1890.

FILED
DEC 18 18
JAMES H. McKENN
CL

Supreme Court of the United States.

October Term, 1893.—No. 188.

THE NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

JANE EVERETT, Administratrix of Wm. J. Everett,
Deceased.

In Error to the Circuit Court of the United States for District of North Dakota.

BRIEF FOR PLAINTIFF IN ERROR.

JAMES McNAUGHT,
A. H. GARLAND,
H. J. MAY,
For Plaintiff.

McGILL & WALLACE, Washington, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1893.

THE NORTHERN PACIFIC R. R. COMPANY,
Plaintiff in Error,

vs.

JANE EVERETT, Administratrix of Wm. J. Everett, deceased.

No. 188.

In Error to the Circuit Court of the United States for the District of North Dakota.

BRIEF FOR PLAINTIFF IN ERROR.

This was an action for damages originally brought by William J. Everett, deceased, against the Northern Pacific Railroad Company. Plaintiff has since died, and the defendant in error was appointed his administratrix.

In the complaint filed in the district court of the Territory of Dakota, after alleging the organization of the railroad company and the road running through Jamestown, Dakota Territory, it is stated that on July 6, 1889, William J. Everett was acting as switchman for plaintiff company in the latter's yards at Jamestown, and it was a part of his duty to couple cars; that on that day, while endeavoring to couple a certain car owned by plaintiff in error under orders from the yard foreman, he was injured; that plaintiff in error had not given him—

although he was inexperienced in railroad work—any notice of the dangers of switching; that the injury he received was of a permanent character; that he was damaged to the extent of thirty thousand dollars. Judgment for that amount and costs was prayed for (Rec., 2–3); plaintiff in error made answer to complaint, and after admitting the allegations relating to its organization and operation, denied all the other allegations therein contained; answering further, plaintiff in error alleged that if any injuries were received by decedent, they were caused by his own negligence and not by that of plaintiff in error (Rec. 5).

Affidavits on motion for commission to take testimony out of the Territory were filed (Rec., 6); also notice of the motion (Rec., 7); order was entered November 8, 1889, for commission to take deposition (Rec., 8); commission to take testimony was issued November 8, 1889 (Rec., 10). The case was removed, on motion of the company, to the U. S. Circuit Court, district of North Dakota (Rec., 14–15), and there tried (Rec., 17–18), and Everett obtained judgment against plaintiff in error for the sum of seven thousand dollars ($7,000), and costs, $75 (Rec., 18). Plaintiff in error filed a motion for a new trial (Rec., 18), which was denied.

The case comes to this court upon writ of error, and while there are several errors formally assigned (Rec., 87), there is properly but one question in law for this court to pass upon, and that is contained in the third assignment, which reads as follows:

"Third. The court erred in instructing the jury as follows: 'If you find the lumber was negligently loaded—that is, in an unusual manner—and that this fact was unknown to the plaintiff, then when the plaintiff was ordered to couple the cars, he had a right to assume that the car was properly loaded, and act on that assumption; but if before the peril was encountered he discovered the projecting lumber, he should have desisted from

any effort to make the coupling, or should have made it in some manner that would not have subjected him to injury, if it was practical for him to do so, and if by the exercise of proper diligence he might have discovered the projecting lumber before the accident and in time to avoid it, he can not recover.'" (Rec., 87.)

The portion of the instruction excepted to above is the latter paragraph of the charge of the circuit judge to the jury (Rec., 84).

As between master and servant, the latter has the right to assume that the master will exercise reasonable care for safety of his servants; but on the other hand, a *master* has the right to assume that a servant hired in the ordinary course knows the dangers incident to the employment, and will avoid them. The servant tacitly assumes such risks.

2 Kent's Com. (13 ed.), 260, note.

Everett, in his own testimony (Rec., 37), says *he thought the lumber might stick over*, and it appears from this part of his testimony he really did have doubts as to the lumber being loaded carefully. So, then, upon his own showing, he ought by law to be precluded from recovering here; he did not exercise that degree of care which was proper and necessary under the law. And it further appears in the testimony, that it was broad daylight when the accident occurred, and therefore there was no reason in the world why Everett should not have noted that the timbers with which the car was loaded projected beyond its end, and should have discovered such fact before he entered in between it and the box car for the purpose of making the coupling.

Says Mr. Justice Lamar, in Washington, &c., Railroad Company *v.* McDade, 135 U. S., 570: "And further, if the employé himself has been wanting in such reasonable care and prudence as would have prevented the happening of the accident, he is guilty of contributory negli-

gence, and the employer is thereby absolved from responsibility for the injury, although it was occasioned through the negligence of the employer." We insist the part of the judge's charge excepted to (*supra*) is not the law. Bearing in mind the words of the instruction referred to, let us inquire further into the question of negligence on the part of the plaintiff.

Said Lord Chief Justice Abbott at Nisi Prius: "If you charge anybody with a loss arising from mistake, you should show *that no due diligence could have been used by you which might have prevented the loss.*"

Harden *v.* Dalton, 1 Car. & Payne, 181.

"In an action for an injury occasioned by the negligence of another," says Mr. Starkie, "it is a good defense to show that the injury so far arose from the negligence of the plaintiff himself that he might by ordinary care and caution have avoided the injury."

2 Stark. Ev., 741 Tit. Nuisance.

So, though the party charged be in fault, yet, if the proximate and immediate cause of the accident be the unskillfulness of the plaintiff, there is no relief.

Flower *v.* Adam, 2 Taunt., 314;

S. P. Butterfield *v.* Forester, 11 East., 60;

See Sedg. Dam. (2d ed., 93, *et seq.*), and 467 *et seq.*, where there is a collection of cases cited fully sustaining the proposition above stated, especially note *, p. 468.

Hence the court erred in stating, that Everett had a right to assume that the car was properly loaded, without, at the same time, telling the jury that some portion of the duties of a car inspector were cast upon Everett himself, and he should have discharged those duties before he undertook the work.

Authorities *sup.*, and also Bennett *v.* N. P. R. R. Co., 49 N. W., 408 (S. C., 2 N. D., 112).

It will be observed, that notwithstanding the charge of the court below upon the case, the law as given by the authorities above cited is not included in it—the charge does not embrace it, and the plaintiff is entitled to have the whole law applicable to the case given in some shape to the jury. If the circuit court had, in its charge, given substantially the law asked for by plaintiff, that would have sufficed, but not doing this at all, it is error of which plaintiff can justly complain.

The Schools *v.* Risley, 10 Wall, 91;
Iron, &c., *v.* Cheeseman, 116 U. S., 529;
Patrick *v.* Graham, 132 *Ib.*, 627;
135 U. S., 544, *sup.;*
Bizzell *v.* Booker, 16 Arks., 309;
3 Gra. & Wat., New T., 710 *et seq.*

Everett, in his complaint (Rec., 3), averred, that he had been given no notice by the company of the dangers of switching, etc.; the rules of the company were admitted in evidence on the trial (Rec., 66), and it was proved that Everett had had a copy of these rules (Rec., 68). In these rules employés are *explicitly* and *fully* informed and notified of the hazardous and dangerous nature of *coupling*, *switching*, etc. What more notice could one expect than this? "All persons entering into or remaining in the service of the company are warned that the business is hazardous and that in accepting or retaining employment they must assume the ordinary risks attending it." And yet this is found in the rules, a copy of which Everett had.

The whole case considered, simply changing the character of the employment, the language of this court in *Bunt's case, 138 U. S., 485*, is directly applicable here. The court, in that case, characterized the action of Bunt as going to the extreme of recklessness, and the testimony in this case shows that the action of Everett is but

little, if any, short of that. Here, as in Bunt's case, 'the evidence warrants no other conclusion than that he" (Everett) "took the risks of the work in which he was employed, and that his negligence in the course of that work was the direct cause of" the injury complained of by him.

And upon that state of facts, this court sustained the court below in directing a verdict against Bunt; so the trial court in this case should have directed a verdict against Everett, because, as stated in the first and second assignments of error (Rec., 87) the evidence was not sufficient to warrant a verdict in his favor. (See cases cited, 138 U. S., *sup.*)

And it is submitted that the three assignments of error herein (Rec., *sup.*) are fully sustained, and the case should be reversed.

JAMES MCNAUGHT,
A. H. GARLAND,
H. J. MAY,
For Plaintiff.

Supreme Court of the United States

OCTOBER TERM, 1893.

TERM NO. 188.

THE NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error

vs.

JANE EVERETT, ADMINISTRATRIX OF WILLIAM J. EVERETT, DECEASED.
Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

Brief for Defendant in Error.

S. L. GLASPELL,
COUNSEL FOR DEFENDANT IN ERROR.

NORTH DAKOTA CAPITAL PRINT.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA.

BRIEF FOR DEFENDANT IN ERROR.

S. L. GLASPELL, Counsel for Defendant in Error.

STATEMENT OF FACTS.

The defendant in error, William J. Everett, sustained a personal injury while performing his duties as a yard switchman in the service of plaintiff at Jamestown, North Dakota, on the 6th day of July, 1889. A train recently arrived was being switched and Everett was attempting to couple a moving flat car to a box car standing on a side track in the plaintiff's yard. The lumber belonging to plaintiff, (record p. 76), was shipped from the east, and unloaded at plaintiff's lumber yard. (record 75). The lumber was loaded in an unusual and

dangerous manner (record pp. 41–51–53). The flat car was thirty feet in length and was loaded in two tiers or piles with timbers twelve inches square and sixteen feet in length. It is usual and proper to load such lumber on a thirty foot car, in one tier, (record, 53). Everett was a young man, twenty-four years of age and without experience or knowledge in the business of car coupling or switching except such as he had acquired in the six or seven days of his employment by the defendant as switchman, (record, 20). The car by which he was injured was the first with a projecting load which he had seen or attempted to couple, (record, 25), and he had received no notice or warning of the danger of coupling cars with projecting loads, (record, 31). The space for coupling between the ends of cars is usually about thirty inches (record, 71), and it is necessary in coupling to place the body between the ends of the cars, (record 64, 65–74). It was especially necessary since Everett found no pin in place and had to pick one up from the ground and set in place in time to receive the approaching flat car which had been "kicked" from another track upon and over the side track No. 7, where the coupling was to be made. This operation was conducted by the foreman of the crew, and Everett in obedience to an order from him after opening a switch to permit the flat car to run in on track No. 7, hastened in advance of it to station himself at the box car to meet and couple the other car which had been given impetus by the switch engine so that it would proceed alone to its point of destination on track No. 7. There should have been a pin in or upon the draw head of the box car but there was none, and Everett looking, espied one on the ground. Seizing it he hurried to his position; all this time running and had but set the pin in place and turning seized the link of the flat car to enter it into the draw head of the box car, when he discovered that the lumber projected over the end of the car and to such an extent as to be dangerous. He dropped the link and made a spring backwards to escape but his head was caught between the end of the lower outside timber on the flat car and an iron bolt projecting from the box car so that he was severely and permanently injured. He died during the pendency of this writ of error and Jane Everett, as his administratrix, has been substituted as a party.

ARGUMENT.

The master must furnish his servant with a reasonably safe place in which to perform his work and all authorities agree that to diminish the standing room between the ends of cars to be coupled by projecting loads so as to leave insufficient space for coupling is negligence.

Dewey vs. Detroit G. H. & M. R. Co. 52 N. W. Rep. 943 (Mich).

Irvine vs. Flint & P. M. R. Co. 50 N. W. Rep 1008 (Mich).
Haugh vs. C. R. I. & P. Ry. Co., 73 Iowa 66.
Ayres vs. Richmond & Danville R. Co. 33, Amer. and Eng. R. Cas. 269, (Va).
Brown vs. Railroad Co. 15 Amer. and Eng. R. Cas. 271. (Kan).
Brice vs. Railroad Co., 9 S. W. Rep. 288, (Ky).
Railroad Co. vs. Galvin, 11 So. Rep. 231, (Fla).
Day vs. Railroad Co., 42 Mich. 523.
Railroad Co. vs. Plunkett, 25 Kan. 130.
Northern Cent. R. Co. vs. Husson, 12 A. and E. 241.
Byrnes vs. Railroad Co., 21 N. E. 50.
Scott vs. Oregon Ry Co., 13 Pac. Rep. 91.
Railroad Co. vs. Gower, 3 S. W. Rep. 824.
Boyle vs. Railroad Co. 23 N. E. 827.
Lothrop vs. Fitchburg R. Co. 23 N. E. 227.
Brennan vs. Mich. Cent. R. Co., 53 N. W. 357.
Mexican Cent. Ry Co. vs. Shean, 18 S. W. 151.

It is not intended to assert that the cases cited all support the right of the plaintiff below to recover in this case; indeed, most of them hold that the brakeman or switchman assumes the risk. These cases and all simular cases seem to concede that a car loaded as was the one here is improperly or negligently loaded. Liability for such negligence is avoided by the assumption that cars are usually so loaded, that such negligence has become such a custom as to give warning and notice to all engaged in the business of coupling cars that they, knowing this danger, assume the risk. These cases—just mentioned— stand upon different facts from the one at bar and are to be distinguished in these important particulars, viz: In thiscase no such negligent custom of improperly loading cars was shown and there was evidence that no such custom existed. In every case where a brakeman has been held to assume such risk it was shown that he had experience in the very matter of such dangerous methods of loading cars, while here it was shown that Everett had worked but a week and had no notice, warning or knowledge of the extra hazardous work of coupling cars with projecting loads.

Not one of these cases goes to the extent of holding that an inexperienced man assumes such risk, nor where such dangerous method of loading cars is not permitted and is not usual or customary.

This distinction is clearly stated by Judge Valentine, in Railroad Co. vs. Plunkett, 25 Kan. 130–140, as follows: "If this had been "the first time that cars had been received in the yard loaded in the "manner in which these cars were loaded, or if the deceased had been "a new man in the yard, or inexperienced; or if it had been in the "night time that the coupling was done, as was the case in Hamilton "vs. Des Moines Valley R. Co. 36, Iowa, 32, it might then, and

"probably would, have been negligence for the defendant to order the "deceased to make the coupling, without first explaining to him the "conditions of the loads, and all the dangers connected with the act "of making such a coupling. And even then, after making such "explanations, it might still have been negligence if the deceased had "been inexperienced, and if the defendant knew it."

The same distinction is noted by this Court in Kohn vs. McNulta, 13 Sup. Ct. Rep. 298, a car coupling case, where the brakeman was shown to have had experience in coupling the very kind of cars which caused the injury. And see Mis. Pac. R. Co. vs. Callbreath, 1 S. W. Rep. 622 (Texas).

If the risk from coupling cars with projecting loads was one ordinarily incident to and fairly within the scope of Everett's employment as a yard switchman, he assumed it upon entering the service of the railroad company, and he knew when he entered such service that it was a custom to improperly load or receive cars with projecting loads, he is deemed to have contracted with reference to such dangerous custom and to have assumed the risk. But if no such custom existed, or if existing he was ignorant thereof, or of facts which should apprise him of it, and if such custom exposed him to unnecessary hazard when he was called upon in an emergency and in great haste to perform the duty assigned to him, he did not assume such risk upon entering the employment of plaintiff in error and his right to recover can only be defeated by contributory negligence.

Fordyce vs. Lowman, 20 S. W. Rep. 1090, (Ark).

As was shown here no custom existed on this railroad of loading cars with projecting loads. It was affirmatively shown that Everett had no experience with such cars. He had not seen one and had not attempted before to couple such a car. He was young and inexperienced, and that fact was well known to the officers of the railroad company when contracting for his services. This case must be governed by its own facts and circumstances.

In view of the evidence the jury could fairly find and presumably did find that the car in question was loaded in an improper and unusual manner, of which Everett had no notice, warning or knowledge save as the danger was obvious to him as a common laborer not skilled in the business of coupling cars. Whether the danger was such as should challenge his attention, and whether he was or was not guilty of contributory negligence in attemsting a dangerous work in a careless manner is the real issue here. Contributory negligence is a defense and the burden of showing it is upon the defendant below.

Railroad Co. vs Gladmon, 15 Wall. 401.

Whether Everett was guilty of contributory negligence or not was properly submitted as a fact to the jury.

Northern Pac. R. Co. vs. Herbert, 116 U. S. 642.

Northern Pac. R. Co. vs. Mares, 123 U. S. 710.

Kane vs. Northern Cent. R. Co., 128 U. S. 91.
Hungerford vs. C. M. & St. P. R. Co., 41 Amer. and Eng. R. Cas. 269 (Minn).
Lawless vs. Railroad Co., 18 Amer. and Eng. R. Cas. 96 (Mass).
Greenleaf vs. Ill. Cent. R. Co., 29 Iowa 14.
Goodrich vs. N. Y. Cent. R. Co., 22 N. E. Rep. 97.
Ohio & M. R. Co. vs. Pearcy, 128 Ind. 197.

Upon all the facts and circumstances the jury found that Everett was not guilty of negligence which contributed to his injury and that he could not be held to have known and appreciated the danger which confronted him.

It has been said by this Court that the disposition of men to care for themselves may in such cases be taken into consideration.

Railroad Co. vs. Gladmon, 15 Wall. 401.

Can it be said that the jury was not justified in so assuming or in arriving at such finding? Is the evidence so clear that Everett should have known or appreciated his danger that reasonable minds may not reach different conclusions? He had not noticed the flat car and his attention was not called to the manner in which it was loaded until in the very act of making the coupling. While doing his work he was necessarily hurried and for the most part running. Could he nicely calculate, admitting that he could see the lumber projecting, that it projected so far as to make his position dangerous? The space for coupling is conceded to be about thirty inches and the lumber projected but twenty-two inches. If but twenty inches he would have had sufficient space. Switchmen of experience might still have avoided the danger by stooping below the projecting ends but he had no such experience and in his emergency and fright did only what an ordinary man might do under similar circumstances.

In a similar case the Supreme Court of New York said; "Under such circumstances, when the whole transaction is the work of a moment, a man is not to be held responsible if he errs as to the estimate of the danger that confronts him. If he acts the part of a prudent man, willing to and intending to perform the duty to which he has been assigned, he has done all that the law demands of him; and whether he acted such a part under the circumstances of this case was for the jury to determine."

Goodrich vs. N. Y. Cent. R. Co., 22 N. E. Rep. 397.
And see Beach on Contributory Negligence, Sec. 14.

We have not yet seen the brief of counsel for plaintiff in error, but it will doubtless be urged here, as in the trial court, that Everett was guilty of contributory negligence for his alleged failure to observe a certain rule of the railroad company, being rule number 25, (record 66) which required him to exercise great care in coupling cars and enjoining upon him the duty before coupling cars, to exam-

ine *so as to know* the kind and condition of the draw heads, draw-bars and links and coupling apparatus. By this rule coupling by hand was prohibited, and the servant was instructed to "use for guiding the *link* a stick or pin." He was furthermore required to provide a stick or pin for himself.

Railroad companies as a rule provide tools for their employes, but knowing from experience that men do not and will not use sticks or pins for the purpose of guiding the link, and having no intention of providing or requiring the use of such implements, it was necessary to provide that the servant must supply the tools.

It may be seen readily that the rule above cited is inapplicable here because no complaint is made against the coupling apparatus. It was not a defective draw-head, link or any part of the coupling apparatus which injured the defendant in error, but it was the situation in which he was placed, the place in which he was required to work, which proved dangerous. The cars were in good condition as far as the evidence discloses, and, without the projecting lead, ample space was provided for coupling. It was the combination, the bringing together of the flat car and the box car, which dangerously diminished the space ordinarily left for coupling, which made the place unsafe.

The rule could not apply here for the further reason that it is not claimed that Everett was caught between or injured by the coupling apparatus. There was no pin in the draw-head of the box car, and it was necesary for him to secure one and place it there since the link was in the draw-head of the moving flat car, and a coupling could not be made without it. Now this iron pin could not be held nor handled with a stick or pin and the rule only contemplates the use of such implement for *guiding the link*. It was necessary, as conceded by the witnesses for the Company, that Everett should place his body between the ends of the cars in the performance of his work, (record pp. 64–65–74).

The apparent object of the rule is to save the hands of the men from being caught between the draw-heads, and where, as in this case, the injury results from the man's body being caught between the ends of the cars, then the rule is immaterial.

The Supreme Court of North Dakota held to a literal compliance with this rule in Bennett vs. Northern Pacific Ry. Co., 49 N. W. Rep. 408, but on a new trial, 54 N. W. Rep. 314, the holding is modified so that the servant is under obligation to look at the coupling apparatus to see if it is all right before making a coupling; but this is held not to involve a critical examination of the apparatus.

That this rule was not obeyed, and was habitually ignored, with the knowledge of the officers of the Company, is shown in Seese vs. Northern Pacific Ry. Co., 38 Fed. 487, and Northern Pacific Ry. Co. vs. Nickels, 50 Fed. 718.

Everett claimed not to have seen or known of this rule. If it had been in vogue or was enforced during his service of one week he would have known it, but he did not know what rule was in force in this regard at any time, not even at the trial, (record p. 25).

Where an employe has been but a short time in the service of a railroad company, knowledge of its rules must be brought home to him in order to hold him to their observance.

Dunlap vs. Notheastern Ry. Co. 130 U. S. 649.

It is plain that Everett's attention was diverted and that a strict compliance with the rule was rendered inconsistent by other and conflicting duties. In such case full obedience is not required.

Hall vs. C. B. & N. R. Co., 49 N. W. 239 (Minn).

Penn. Co. vs. Roney, 89 Ind. 453.

Now he had not noticed this car except in a general way until he was in the act of making the coupling. The switching crew consisted of three men, a foreman and two helpers. One of the crew testified (record 40) that Everett had no opportunity to see the timbers sticking over the car because of his having to throw the switch and run ahead of the cars to get in position and be ready to make the coupling. It seems that the train was started and sufficient momentum given the cars to "kick" certain cars on certain side tracks and Everett received from the foreman an order to attend No. 7. That meant in the language of the railroad yard, that he should open or throw the switch to permit the car to pass in on track No. 7, and also that he should couple it to any car or cars standing there. Cars placed on side tracks in the vicinity of other cars being required to be coupled thereto to prevent their moving from the place where they are located. Now Everett testified that the box car was 150 or 160 feet distant from the switch and the flat car was approaching so that he had "just good time to go and set the pin in that car," meaning the flat car. (Record 33).

He did not wait for the flat car to pass the switch but ran ahead of it. The record (33) shows that he testified that he stood at the switch until the car passed it but this is an error of his or some of the stenographers or printers in reporting or printing the testimony. His testimony as a whole shows that immediately upon throwing the switch he ran ahead of the car. Kieren says the same (record 40). He must have thrown the switch before the car reached it and as he immediately left it and started running for the other car it is evident that he had but little time for observation of the load on the flat car. While at the switch stand he must have been engaged solely in attending to that duty. Working a switch which usually requires to be unlocked does not permit one to be attending to some other duty at the same time. It is clear, therefore, that when this car came upon the attention of Everett he was constantly engaged in other and conflicting duties which prevented his making that examinatjon of the load of

the flat car so as to know that it was not safe.

Promptness and celerity in the discharge of his duty is expected of a switchman and it is generally held that he has a right to assume that his master has supplied safe tools and a safe place in which to perform his work.

In King vs. Ohio, etc. R. Co., 14 Fed. 277, Judge Gresham held, that "The master is bound to protect the servant, not against all risks, but against risks which could be avoided by the exercise of a reasonable care on the part of the master. The brakeman's employment exposes him to constant peril under the most favorable conditions. He is expected and required to act with dispatch in coupling and uncoupling cars, and when he is negligently required by the proper officers or agents to handle cars out of repair, unfit for use and dangerous, and in doing so is injured, perhaps for life, without fault on his part, he should, in justice, have a remedy against his employer. * * * It does not appear from the evidence that the petitioner knew the coal car was out of repair when he ran in, as he was accustomed to do and as brakemen usually do, to make the coupling, or that, without stopping or looking before running in, he might have seen that it was unfit for use. He testified that he discovered for the first time when he was between the cars and when it was too late to escape, that the drawbars would not meet. Knowing that promptness in the discharge of his duties not only recommended him to his employer, but that it was required of him, the petitioner had a right to assume, without inspection, as he no doubt did, that the cars he was required to couple were in a proper state of repair for handling."

The general rule upon the subject of the examination required to be made by a switchman is well stated by the Supreme Court of Indiana, as follows: "An employe is required to observe and avoid all known or obvious perils, even though they may arise from defective machinery or appliances; but he is not bound to search for defects, or make a critical inspection of the appliances which are provided for his use."

O. & M. R. Co. vs. Pearcy, 27 N. E. Rep. 479.

From the undisputed testimony in this case it appears that Everett's first opportunity to examine the flat car was while it was in motion and very near to him. He then discovered that he was in danger, but too late. He doubtless saw the car before that but could not tell from such a hurried glance as he may have given whether the lumber projected, or if so, how far. Looking straight at the end of the car, as Everett says, "one could not see the bottom of it, and to ascertain whether the lumber projected enough to be a source of danger would involve a careful examination and such as he had no opportunity to make.

If Everett's attention had not been diverted from the flat car by

his search for a pin and his efforts to place it in position, then it might fairly be said that he should have discovered his danger in time to escape. Even that is not perfectly clear because it is apparent that if he could only see the ends of the lumber and could not see the bottom of the car it would still be difficult to know that the projection would diminish his standing room to the point of danger. If the lumber had projected but fifteen or perhaps as much as twenty inches, still Everett would have had sufficient space left. Very few persons can accurately measure distances with the eye. The familiar pastime of marking the height of a silk hat illustrates that the great majority of men are very far from being able to correctly estimate distances.

In Bennett vs. Northern Pac. R. Co., 54 N. W. Rep. 314, the precise point under consideration was passed upon. A switch engine was to be coupled to a flat car. The switchman stood on the short side of the curve on the foot-board attached to the engine and knew that the engine was equipped with a draw head which projected only six inches. He could see that the drawhead on the car projected about twelve inches. This diminished the usual standing room nearly half and the court held that he had a right to assume that sufficient space was still left to enable him to make the coupling. If it should be admitted that Everett could see that the lumber projected over the end of the car it cannot fairly be asserted that he was bound to take notice that such fact indicated danger.

This case is not like the double dead wood cases, where the danger is said to be apparent and obvious.

Michigan Cent. Ry Co. vs. Smithson, 45 Mich. 212.
Baldwin vs. C. R. I. & P. R. Co., 50 Iowa 680.
Kohn vs. McNulta, 13 Sup. Ct 298.

Of this class of cases Mr. Thompson says, in his work on negligence, (vol. 2, page 989): "In all these cases care must be taken to note the distinction between a vice common to a whole class of cars, with which the brakeman may be supposed to be familiar, and a vice peculiar to a particular car, such as a defective draw-bar, of which the brakeman may have no knowledge."

There was proof in this case tending to show that the vice in question was peculiar to the car in question and was not common or usual. That issue was submitted to the jury and by their verdict it stands settled.

The Circuit Judge of the Eighth Circuit, with the District Judge for North Dakota, presided at the trial of the case below. They heard the evidence and saw the witnesses. They denied an application for a new trial. The issue presented here which resolves itself into a question of contributory negligence is one which is peculiarly appropriate for submission to a jury. As Mr. Justice Miller said, in Jones vs. Railroad Co., 128 U. S. 443, "We see no reason, so long as the jury system is the law of the land, and the jury is made the

tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others."

It is respectfully submitted that there is some conflict in the evidence, that fair minds might arrive at different conclusions upon the questions at issue, and therefore the verdict should stand and the judgment be affirmed.

S. L. GLASPELL,
Counsel for Defendant in Error.